Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

October Term, 1996

JOSE GRACIA and MARY GRACIA, Individually and on Behalf of the Estate of JOSE ANGEL GRACIA, III, a Deceased Child and as Next Friends of MONICA GRACIA, ADAM GRACIA and CHRISTOPHER GRACIA, Minor Children,

Petitioners,

v.

RAUL TREVINO, Individually and as Executive Director of the Housing Authority of the City of Brownsville, GENOVEVO RUBALCABA, Individually, and as Supervisor of Maintenance of the Housing Authority of the City of Brownsville, and the HOUSING AUTHORITY OF THE CITY OF BROWNSVILLE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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108 pp

QUESTION PRESENTED

1. Does the Texas Tort Claims Act grant immunity to municipalities and their policy-making officials in the operation of Housing and Urban Development low-cost housing projects, such as the Brownsville Housing Authority of Brownsville, Texas, where such officials under the color of State law subjected or caused to be subjected guests of a tenant of said Brownsville Housing Authority (BHA) to the deprivation of 42 U.S.C.A. section 1983 civil rights secured by the Constitution, federal and Texas State laws where:

(a) municipal housing authorities are not immune from section 1983 civil rights claims; *Monell v. New York City Dept. Soc. Services*, 436 U.S. 658, 690, 691 (1977); *Board of Commissioners of Bryan County, Okla. v. Brown*, 117 S.Ct. 1382 (1997); *Pembauer v. City of Cincinnati*, 475 U.S. 469 (1986); *City of Canton v. Harris*, 489 U.S. 378 (1989); *Jett v. Dallas Ind. School Dist.*, 491 U.S. 701 (1989);

(b) the Brownsville Housing Authority (BHA) was not covered by the Texas Tort Claims Act on the date of the occurrence either by:
(i) statute; Texas Local Government Code Annotated section 392.011(b); Housing Authorities Laws of Texas, article 1269k sections 7 and 8; or
(ii) case law; *City of Amarillo v. Ware*, 120 Tex. 456, 40 S.W.2d 57 (1931); *City of Galveston v. Posnainsky*, 62 Tex. 118, 127 (1884); *White v. Bolner*, 223 S.W.2d 686 (Tex. Civ. App. – San Antonio 1949, writ ref'd); *Housing Authority of Dallas v. Higginbotham*, 135

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Tex. 158, 143 S.W.2d 79 (1940); *Eli Lilly & Co. v. Marshall*, 850 S.W.2d 155 (1993);

(c) if BHA were covered by Texas Tort Claims Act on date of occurrence, exemptions of the Act removed it; Tex. Civ. Prac. & Rem. Code Ann. Sections 101.021(2), 101.0215 (Vernon 1997); Texas Local Government Code Annotated section 392.006 (Vernon Supp. 1997); *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30 (Tex. 1983); *Board of Commissioners of Bryan County, Okla. v. Brown*, 117 S.Ct. 1392 (1997); *Brown & Root, Inc. v. City of Cities Mun. Util.*, 721 S.W.2d 881 (Tex. App. – Houston [1st Dist.] 1986, no writ);

(d) the BHA lease confers the same leasehold rights, privileges, and immunities on guests as it does on tenants under both federal and Texas State law; *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990); *Wright v. City of Roanoke Hous. Auth.*, 479 U.S. 418 (1986); *Hafer v. Melo*, 502 U.S. 21 (1991); *Parker v. Highland Park Inc.*, 565 S.W.2d 512 (Tex. 1978); *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452 (Tex. 1972); *Erie Ry. v. Tomkins*, 304 U.S. 103 (1939); *Hafer v. Melo*, 502 U.S. 21 (1991); *Comeaux v. T.L. James Co.*, 702 F.2d 1023 (5th Cir. 1983).

LIST OF PARTIES

The parties to the proceedings below were the appellants, JOSE GRACIA and MARY GRACIA, Individually and on Behalf of the Estate of JOSE ANGEL GRACIA, III, a Deceased Child and as Next Friends of MONICA GRACIA, ADAM GRACIA and CHRISTOPHER GRACIA, Minor Children, and the appellees, RAUL TREVINO, Individually and as Executive Director of the Housing Authority of the City of Brownsville, GENOVEVO RUBALCABA, Individually, and as Supervisor of Maintenance of the Housing Authority of the City of Brownsville, and the HOUSING AUTHORITY OF THE CITY OF BROWNSVILLE.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Jose Gracia, et al., residents of the State of Texas, pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 105 F.3d 1053. The opinion of the district court (Appendix B) is unreported.

JURISDICTION

The Court of Appeals entered its judgment on February 14, 1997. (Appendix A). A timely application for rehearing en banc was requested on February 28, 1997, and the petition for rehearing en banc was denied on April 23, 1997. (Appendix C). This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1993).

STATUTORY PROVISIONS INVOLVED

United States Constitution, article VI, clause 2.
United States Constitution, Fourteenth Amendment.
28 United States Code § 1254(1) (1993).
42 United States Code § 1983 (1994).

24 Code of Federal Regulations:

> § 966.4(d), lease shall include reasonable accommodations of tenant's guests and visitors;
>
> § 966.4(e)(1)-(4) (1990), leased premises must be maintained in decent, safe and sanitary condition; comply with all building and housing codes and HUD regulations materially affecting health and safety; make necessary repairs to premises; and keep facilities and common areas in clean and safe condition;
>
> § 966.6(c) (1990), forbids exculpatory clauses in the lease;
>
> § 968.115(b) (1990), preventive maintenance.

Texas Housing Authorities Law, Tex. Loc. Gov't. Code Ann. § 392.001 et seq.,

> § 392.011 (Vernon 1988), authorized the City of Brownsville to establish a housing authority which it did on March 24, 1938;
>
> § 392.031(a) (Vernon 1988), authorized the City mayors to appoint five commissioners, who with the Executive Director constitute the Brownsville Housing Authority;
>
> § 392.041(a)-(h) (Vernon 1988), the mayor has the exclusive authority to remove commissioners for incompetence, inefficiency, and negligence;
>
> § 392.006 (Vernon Supp. 1997), governmental immunity was not conferred on housing authorities until August 28, 1989.

Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. § 101.001 et seq.,

§ 101.021(2) (Vernon 1997), governmental units are liable for personal injury and death caused by a condition or use of tangible personal or real property.

§ 101.0215(a)-(c) (Vernon 1997), conferring immunity on 33 municipal functions but not including housing authorities.

Texas Housing Authorities Law, Tex. Civ. Stat. Ann. art. 1269k §§ 7, 8 (Vernon 1937).

Texas Tort Claims Act, Tex. Rev. Civ. Stat. Ann. art. 6252-19 § 3 [cited in *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30 (Tex. 1983).]

STATEMENT OF THE CASE

A. The Occurrence:

On July 24, 1988, as children sat in a hammock during a summer cookout, a tree suddenly collapsed, fatally injuring Jose, age 11, and inflicting irreparable brain injury and physical paralysis on Monica, age 2. These petitioners were guests of Ezequiel Gracia, their great-grandfather, at a family gathering adjacent to his home apartment at Unit 15 of the Victoria Gardens, a section of the Brownsville Housing Authority (BHA), where he was a leasehold tenant. (Appendix D). Petitioners, Jose Gracia, age 11, Monica Gracia, age 2, and Adam Gracia, age 6, siblings, along with a young cousin were sitting in a hammock awaiting a picnic dinner. For many years this hammock had been strung between two trees, one of them a large, heavy avocado tree some twenty-feet tall. This tree had been topped and all the branches, being

dead, stripped off with a rope by a member of the BHA maintenance crew months before, leaving a naked pole.

The Brownsville Housing Authority (BHA) was established by Resolution of the City of Brownsville, Texas to provide low-cost public housing for residents of the city on March 24, 1938, (Appendix E), as authorized by Tex. Loc. Gov't. Code Ann. section 392.011 (Vernon 1988). Respondent Raul Trevino was, and had been, the Executive Director of BHA from 1980 and prior to that Executive Director at Laredo, Texas from 1944 to 1980. He is the chief executive officer of the project with power and control over all maintenance, welfare and safety of the grounds, tenants and others on the project. The corresponding duties and responsibilities that attach to his status are set out in federal regulations 24 C.F.R. sections 966.4(d), (e)(1)-(4), 966.6(c), 968.115(b) (1990); the BHA Texas Manual of Operations, Maintenance (Appendix F), and Job Descriptions (Appendix G). The BHA Texas Manual of Operations dealing with maintenance and the job descriptions of the executive director and superintendent of maintenance were prepared by respondent Trevino himself and approved by the HUD regional director. (Appendix H). Between the time the maintenance manual was approved by the HUD regional director in 1983 and the collapse of the avocado tree in 1988, the respondents conducted only one inspection of Unit 15. The manual requires routine, ground maintenance including trees, (Appendix F) and preventive maintenance of the grounds at a minimum of twice a year. (Appendix F). The Executive Director, respondent Trevino, admitted that had the avocado tree been properly inspected following the severe freeze of 1983, the respondents would have known

it was dead. (Record, Video Taped Deposition "VTD" at 189; L7-25 at 190; L1-15 at 192; L4-9). Respondent Trevino also admitted that the dead condition of the tree went undetected because neither he nor maintenance superintendent, respondent Rubalcaba, nor their crew properly inspected its condition. Regardless of whether the BHA is or is not covered within the Texas Tort Claims Act, the policy maker and executive administrators of the housing authority, the respondents, cannot deprive the petitioners of their Fourteenth Amendment constitutional rights to life, liberty, and property, and equal protection of the law in conducting their legally required functions of office.

B. Proceeding Below:

Suit was filed initially in state court in Cameron County, Texas, for violation of petitioners' rights under Texas landlord/tenant laws and removed to the United States District Court of the Southern District of Texas, Brownsville Division, when the federal charge of liability under 42 U.S.C. section 1983 (1982) was added. The defendants were Brownsville Housing Authority (BHA); the City of Brownsville; Raul Trevino, individually and as Executive Director of the BHA; and Genovevo Rubalcaba, individually and as Superintendent of Maintenance of BHA. On March 4, 1993 respondent BHA filed motions to dismiss for failure to state a claim, for summary judgment as to the section 1983 claims, for summary judgment for its defense of sovereign immunity, and for judicial notice of limited liability. On August 18, 1993 the district court denied all motions of BHA. (Appendix I). On December 15, 1993 petitioners filed their Joint Pretrial Order. Respondents presented theirs on March 3, 1994, the day

before trial began. Both filings were noted in the Record on the dates filed but not included. Prior to trial the City of Brownsville settled with petitioners. Trial commenced on March 4, 1994. At the close of evidence the court stated the nature of its charge to the jury, stating that at the conclusion of its presentation the parties could object and argue. The respondents immediately objected to the charge in that it restricted consideration of their section 1983 claim by first requiring an affirmative jury finding to the state claim interrogatory where such was limited to respondents', Trevino and Rubalcaba, actually knowing that the avocado tree was dead. Petitioners also filed a Supplemental Objection to the court's main charge on March 18, 1994. (Appendix J). The jury returned its verdict based on a negative answer to the first interrogatory concerning the state claim on March 21, 1994. The court then entered judgment on May 4, 1994 (Appendix B), in favor of BHA and Raul Trevino and Genovevo Rubalcaba in their official capacities. Upon motion during pendency of the trial, the court granted directed verdict and judgment in favor of respondents Raul Trevino and Genovevo Rubalcaba in their individual capacities only. The petitioners were adjudged to take nothing and ordered to pay costs. The petitioners' section 1983 federal civil rights claim was never presented for the jury's consideration but was disposed of by erroneous submission of state law as applied to a business licensee on lessor's property. Even error free state law does not preempt federal law. The petitioners were entitled to an independent submission of their federal section 1983 claims and expressed their objections immediately when the court's charge was announced.

REASONS FOR GRANTING THE PETITION

I. The Question Presented Is Important:

The Fifth Circuit Opinion, *Gracia v. Brownsville Hous. Auth.*, 105 F.3d 1053 (5th Cir. 1997), negates federal sovereignty embodied in federal law and in the Fourteenth Amendment to the Constitution which prohibits depriving a person of life, liberty, or property, without due process of law, by conferring immunity on state agencies or municipalities through state law.

II. Municipal Housing Immunity From 42 U.S.C. § 1983 Civil Rights Claim:

This Court held in *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978) that municipalities do not have absolute immunity to violate constitutional rights or even suggest that such violations are anything but wrong. *Id.* at 700. The Court stated that the remedy was to be broadly construed against all forms of official violation of federally protected rights, and there is no justification for excluding municipalities from the "persons" covered in section 1983. Municipalities cannot be entitled to absolute immunity under section 1983. *Id.* at 700-701.

The United States Fifth Circuit based its opinion on the ground that the Texas Tort Claims Act afforded complete immunity to the BHA at the time of the accident. That, therefore, the guests of the tenant were licensees, and if the respondents did not have actual knowledge of the danger posed by the tree they owed no duty of care to the petitioners. *Gracia v. Brownsville Hous. Auth.*, 105 F.3d 1053, 1055, 1056 (5th Cir. 1997).

While the recent case of *Board of Commissioners of Bryan County, Okla. v. Brown*, 117 S.Ct. 1382 (1997) concludes that under the facts of that case a section 1983 violation did not lie, the opinion presents a historic and legal exposition of the theory and facts that must be tendered to sustain a section 1983 civil rights claim. The petitioners cause meets the criterion required by the *Bryan County* case. For petitioners to impose section 1983 liability, it is necessary to establish a municipal "policy" or "custom" that caused the alleged injuries. A municipality may only be held liable for those deprivations resulting from decisions of its legislative body or of those officials whose acts may fairly be said to be those of the municipality. *Id.* at 1388 (citing *Monell*, 436 U.S. 694); *Pembauer v. Cincinnati*, 475 U.S. 469, 480-481 (1986); *City of Canton v. Harris*, 489 U.S. 378, 392 (1989). The petitioners had to show that the municipal action was taken with a requisite degree of culpability that demonstrates a direct causal link between the act and the deprivation of federal rights. *Bryan County*, 117 S.Ct. at 1388. (Appendix A).

Proof that the action taken or directed by the municipality or its authorized decision maker violates federal law determines that the municipal action was the moving force behind the injuries complained of. *Bryan County*, 117 S.Ct. at 1389. The authority of the Executive Director, Raul Trevino, and Maintenance Superintendent, Genovevo Rubalcaba, respondents, is set out in the City Resolution creating the BHA, (Appendix E), 24 C.F.R. section 966.4(d), (e)(1)-(4), section 966.6(c) covering the rights of tenants, their guests and visitors under the regulations and lease, HUD standards, on maintenance and safety, the BHA Manual of Operations, Maintenance

(Appendix F), and Job Descriptions (Appendix G), which manual HUD area manager Finnes Jolly was urging the Executive Director to prepare since 1981 concerning preventive maintenance inspections of the grounds, buildings and equipment for the safety of tenants, visitors and workers on the project. The director finally put the Maintenance Plan in writing in 1985, but even then he did not follow it or inspect the area of the occurrence in 1988 until the tragedy had taken place. On VTD the director admitted that if he and his superintendent had been maintaining the semi-annual preventative inspections his own maintenance plan required during those three (3) prior years, they would have detected the deadly and dangerous tree before it fell. By both federal and state law, they were obligated to protect petitioners' Fourteenth Amendment constitutional rights against deprivation of life, liberty and property. They failed to obey the legally mandated inspection laws, but as in the *Pembauer* case, where the deputies forcibly entered the petitioner's office acting on the decision-making authority of the county prosecutor, the respondents here ignored the laws specifically directed, resulting in the deprivation of petitioners' rights. *Bryan County*, 117 S.Ct. at 389 (citing *Pembauer*, 475 U.S. at 481); *Canton*, 489 U.S. at 388. Where the decision maker's action was not simple negligence but was taken with "deliberate indifference" as to known or obvious consequences, liability attaches. The trial court's charge to the jury on the petitioners' federal question identified the Executive Director and the Maintenance Superintendent as policy-making "persons" acting under the color of state law. Court's Charge (Appendix K). Once the policy-making official has been identified as to a

particular issue, it is for the jury to determine whether the decisions have caused the deprivation of rights at issue. *Jett v. Dallas Ind. School Dist.*, 491 U.S. 701 (1989), cited by *Bryan County*, 117 U.S. at 1390. As Justice O'Conner points out in *Jett*, the trial court did not have the benefit of that ruling at the time of trial. 491 U.S. at 737, 738. Here both the trial court and the Fifth Circuit were aware of the ruling, but the federal cause of action was never submitted for the jury's consideration.

III. The Brownsville Housing Authority was not covered by the Texas Tort Claims Act on the date of the occurrence, either by statute or case law:

The Supreme Court of Texas established the state liability law of municipalities relative to the conduct of its operations in *City of Galveston v. Posainsky*, 62 Tex. 118, 125-126 (1884). Where a municipality incurs an obligation with its consent, expressed or implied, as is the case of the City of Brownsville establishing the BHA by City Resolution under the Housing Authorities Law, Tex. Loc. Govt. Code section 392.011(a), (b) et seq. (Vernon 1988), it is subject to the same liabilities for the neglect of its obligations as private corporations would be if the same duties and authority were conferred on them. *Posainsky*, 62 Tex. at 126. For acts done essentially for the advantage of the inhabitants of the corporation and in the management of property or rights voluntarily held for the corporation's profit or advantage, violations of those duties incur liability. *Id.* at 127, 131. The first housing law in Texas was the Texas Housing Authorities Law, Tex. Civ. Stat. Ann. art. 1269k (Vernon 1937).

Section 8 of the act, defining the powers of an authority, are set out as "a public body, corporate and politic, exercising public and essential governmental functions." *See, Housing Auth. of Dallas v. Higginbotham*, 135 Tex. 158, 143 S.W.2d 79, 83 (1940). This identical language is used when the Texas Housing Authorities Law is transposed to the Texas Loc. Gov't. Code Ann. section 392.011(b). This initial language and *Posainsky* are again early addressed in *City of Amarillo v. Ware*, 120 Tex. 456, 40 S.W.2d 57 (1931). Where the functions of the municipality are intended primarily for the benefit of those within the corporate limits, as here, the court adopts the *Posainsky* position that the function is proprietary and thus liability attaches to violation. *Ware*, 40 S.W.2d at 60. To the same effect is *City of Houston v. Shilling*, 150 Tex. 387, 240 S.W.2d 1010, 1011 (1951).

The 70th Legislature that enacted the Housing Authorities Law in 1987 also enacted the Texas Tort Claims Act section 101.001 et seq., Tex. Civ. Prac. & Rem. Code Ann. In an effort to clear up the confusion between municipal governmental and proprietary functions, the Legislature enacted section 101.0215, (effective Sept. 2, 1987), the day after the effective date of the Housing Authorities Law. Under section 101.0215(a) the Legislature listed thirty-three (33) municipal functions that would be considered governmental. Housing, housing authorities or housing projects were not mentioned. Not until August 28, 1989 did the 71st Legislature amend the Texas Housing Authorities Law declaring housing authorities governmental functions and not proprietary functions subject to the Texas Tort Claims Act. Tex. Loc. Gov't. Code Ann. § 392.006. The date of the deprivation

of petitioners' constitutional rights was July 24, 1988. The initial 1937 Housing Authorities Law and its later reenactment in the Local Government Code continued the same language as interpreted by the Supreme Court of Texas concerning municipal proprietary functions. A change in the housing status was not enacted by the Texas Legislature until 1989 when it adopted Tex. Loc. Gov't. Code Ann. section 392.006.

The Court is under the misconception that the Texas Legislature created the housing authority as an entity independent of the city and that the city's power was limited to activating the housing authority. *Gracia v. Brownsville Hous. Auth.*, 105 F.3d at 1056. (Appendix A). The Housing Authorities Law itself does not support that reading of section 392.041(a)-(h). This language is the same as that set out in the predecessor statute. Tex. Civ. Stat. Ann. art. 1269k § 7 (Vernon 1937); *White v. Bolner*, 223 S.W.2d 686, 688 (Tex. Civ. App. – San Antonio 1949, writ ref'd). There commissioners of the San Antonio Housing Authority were removed from office by the mayor for inefficiency and neglect of duty – others were appointed in their place. The ousted members sought restraining orders and injunctions. The trial court granted temporary injunction. The appeals court reversed. The appeals court held that "the Mayor and no one else has the power to remove housing commissioners and there is no alternative provision for the power to be exercised by anyone else. . . . " Far from being independent of the city, the commissioners are answerable to the mayor as any other subordinate agent. *Id.* at 689.

The Texas Supreme Court recognizes that Congress may preempt state law when acting within constitutional

limits under article VI, clause 2 of the United States Constitution, either by express terms or by inference from its comprehensive regulation of an area. *Eli Lilly & Co. v. Marshall*, 850 S.W.2d 155, 158 (Tex. 1993). Where compliance with both state and federal law is impossible or the state law stands as an obstacle to the full purposes and objectives of Congress, preemption is authorized. *Id.* at 158. Clothing a municipal act with immunity from violations of constitutional civil rights defeats the full purposes and objectives Congress intended for section 1983 claims. Petitioners should be awarded a new trial so their federal section 1983 claims can be determined by a jury.

IV. Exemptions Removed Brownsville Housing Authority from Texas Tort Claims Act.

Moreover, the initial Texas Tort Claims Act, Tex. Rev. Civ. Stat. Ann. art. 6252-19, section 3 created liability for municipalities for death or personal injuries for causes "from some condition or some use of tangible property, real or personal," under circumstances where the government unit would be liable to the claimant, if a private person or corporation. *Salcedo v. El Paso Hosp.*, 659 S.W.2d 30, 31 (Tex. 1983). There the hospital district, which was held to be performing a governmental function in other respects, was sued by the claimant widow for causing the death of her husband through its agents and employees misuse of and failure to use intravenous, oxygen, and cardiac monitoring equipment and misinterpreting the graphs and charts produced by the equipment. The hospital excepted on the ground the pleadings failed to allege the injuries were caused from some condition or

use of tangible property furnished in a defective condition. The trial court held the claim did not come within any exception to the hospital's general immunity, and the court of appeals affirmed. The Texas Supreme Court reversed and remanded. The Court held that while some allegation of defective condition can be a contributing factor to the injury, liability can also attach from some use of tangible property, real or personal, where such unit, if a private person, would be liable. *Id.* at 32. The Court then held it is not necessary to allege a defective condition of the property if "some use" of the property, rather than "some condition" is alleged to be a contributing factor to the injury. *Id.* at 32; *Brown & Root, Inc. v. City of Cities Mun. Util.*, 721 S.W.2d 881, 884 (Tex. App. – Houston [1st Dist.] 1986, no writ). The exact language of the exemption set out at section 3 of the initial Texas Tort Claims Act is included in the Act in force on the date of the occurrence. Tex. Civ. Prac. & Rem. Code Ann. § 101.001 et seq., § 101.021(1), (2) (Vernon 1997). In addition, as stated above, at the time in question housing authorities were exempt under Tex. Civ. Prac. & Rem. Code Ann. section 101.0215(a)-(c) and were not removed until the enactment of Tex. Loc. Gov't. Code section 392.006 in 1988. The alleged misuse of tangible real property in the infliction of the injuries and damages provide the exemption permitting the submission of liability to a jury. At this point *Salcedo* held the claimant must show there is proximate cause between the negligent or wrongful act or omission of some agent or employee from some condition or use of tangible property where private liability would likewise lie. *Salcedo*, 659 S.W.2d at 32-33. This is the same standard set in *Bryan County*, where the Court

requires the determination that the action taken or directed by the municipality or its decision maker violates federal law and is the moving force behind the injuries complained of. 117 S.Ct. at 1389. Here the decision makers admitted they did not follow their own standards of preventative inspections to maintain the safety of the premises and that they were aware that such neglect could lead to the collapse of trees and injuries. The petitioners are entitled to a jury determination of their section 1983 claims.

V. Under both federal and state law the Brownsville Housing Authority lease confers the same leasehold rights, privileges and immunities on guests as it does on the tenants:

In its opinion the Fifth Circuit found that the Fair Housing Act and its regulations did not confer any enforceable rights on the visiting petitioners as they alleged. This is contrary both to the federal statutory and case law interpreting the Act and its regulations and contrary to the Texas State law on landlord/tenant leases. The opinion states it is not clear that regulations can be considered "law". A violation of a regulation in the Code of Federal Regulations has been held to be prima facia evidence of the original test and is required to be judicially noticed. *Wei v. Robinson*, 246 F.2d 739, 743 (7th Cir. 1957), *cert. den.*, 355 U.S. 879 (1957). The BHA's obligations under the lease are set out in part at 24 C.F.R. sections 966.4(d), (e)(1)-(4), 968.115(b). At both section 966.4(e)(1) and section 968.115(b) the purpose of the housing authority and its lease is stated to be to maintain

the premises and the project in a "decent, safe and sanitary condition." This includes reasonable accommodation of the tenant's guests and visitors. 24 C.F.R. § 966.4(d). The regulations further forbid any exculpatory clauses in the lease agreement to hold the landlord or his agent clear of liability for negligent or intentional acts or omissions. 24 C.F.R. § 966.6(c).

The recent case of *Wilder v. Virginia Hosp. Assoc.*, 496 U.S. 498 (1990) explicates the three-part test for a federal statute to create an enforceable right. First, the statutory provisions at issue must show it was intended to benefit the putative plaintiff. 496 U.S. at 509. Here the HUD regulations, manuals, and regional manager Jolly's instructions require BHA, Director Trevino, and Maintenance Superintendent Rubalcaba to keep and maintain safe and decent conditions in the buildings and grounds of the project, including trees by regular and mandatory inspections. These same leasehold requirements are contained in the municipal ordinances and building codes. By lease and Texas State law the rights of the tenant extend to his guests. 24 C.F.R. § 966.4(d), (e); *Parker v. Highland Parks, Inc.*, 565 S.W.2d 512 (Tex. 1978). The tenant and his guests would be foremost in the objective of keeping safe conditions. Second, the provisions reflect more than a congressional preference. The conduct required of the defendant housing project and officials is couched in mandatory terms – that they shall comply with building codes, housing codes and HUD regulations affecting health and safety, section 966.4(d)(2); and shall keep the common facilities and areas in a clean and safe condition, section 966.4(d)(4). These provisions set forth

more than preferences. They are understandable, obtainable urban housing conditions. Third, these are not vague conditions but are within the competence of the judiciary to enforce. HUD standards state that the BHA must provide adequate maintenance and annual inspections.

Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418 (1987) involved the right of an individual covered by a housing authority lease to enforce a state deprivation of a "right" secured by federal section 1983. The Court held in the affirmative, citing *Maine v. Thiboutot*, 448 U.S. 1 (1980). There the tenants alleged the Roanoke housing project by accounting methods was charging in excess of the maximum rental allowed in deprivation of their property rights secured by federal law section 1983. The housing authority made the same defense the respondents are making here: that the provisions of 24 C.F.R. section 966.4 need only be included in the lease and that it is questionable that the regulations can be considered "law". *Gracia*, 105 F.3d at 1057. Further, *Gracia* held children were not parties to the lease, so the provision of section 966.4 cannot give rise to a section 1983 action. *Id.* at 1057-1058. Here the deprivation of rights complained of are the loss of life and limb, the loss of enjoyment of life and of property. These rights and privileges secured by the Constitution and laws to guests of a low-cost housing project tenant may also be redressed by action at law or in equity by the injured party. *Wright* held that before private enforcement can be foreclosed Congress must indicate the enforcement authority was vested solely in HUD. 479 U.S. at 424, 425. Concerning the administration of the leases and the rent thereunder, the Court found enforcement authority was not centralized in

HUD and private action was anticipated. The Court further found that these rights were not beyond the competency of the judiciary to enforce, and the fact the party had a state right of action did not foreclose section 1983. *Id.* at 429, 432.

The premises law in Texas is that the duty the landlord (BHA) owes to its tenants extends to their guests (petitioners). *Parker*, 565 S.W.2d at 514, 515 (citing with approval Restatement (Second) of Torts, sections 360 and 361); *Baker v. Pennoak Prop., Ltd.*, 874 S.W.2d 274, 275 (Tex. App. – Houston [14th Dist.] 1994, no writ). Where the lessor (BHA) retains a portion of the leased premises under its contract which is necessary to the safe use of the leased part, the landlord is subject to liability to his tenant and others lawfully upon the land with the consent of the tenant for harm caused by a dangerous condition existing on the retained, controlled portion. To recover for such loss the claimant (petitioners) must prove that the lessor (BHA) knew or in the exercise of reasonable care should have known of the dangerous condition. *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 454, 455 (Tex. 1972). The BHA lease requires that the housing authority comply with the local building and housing codes and HUD regulations affecting health and safety for the maintenance of the premises in decent, safe and sanitary conditions. (Appendix D). The Maintenance Operation Plan is to the same effect, (Appendix F), and the HUD federal regulations state that BHA must comply with all state and local health and safety codes, regulations and ordinances. 24 C.F.R. § 966.4(e)(4). The law applicable in petitioners' Texas premises action was that announced by the Supreme Court of Texas in the *Adam*

Dante and *Parker* cases. It was identical with the duty owed the tenant: the duty to know or by the exercise of reasonable care to know of the dangerous condition. Under *Erie Ry. v. Tomkins*, 304 U.S. 103 (1939), the jury should have been so charged on the state claim.

At the conclusion of the evidence, the trial court having charged the jury that the respondents, Executive Director Trevino and Superintendent of Maintenance Rubalcaba, were "acting under the color of state law at the time of the acts complained of," (Appendix K), the petitioners' section 1983 civil rights claims should have been submitted to the jury to determine the culpability of the respondents. *Jett*, 491 U.S. at 737, 738. On the question of personal liability in a section 1983 claim, the claimant need only show that the official acting under the color of state law caused the deprivation of a federal right. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Both the petitioners' state and federal claims should have been submitted independently of each other. Fed. R. of Civ. Proc. 49(a). The Fifth Circuit recognizes and has enforced that rule. *Comeaux v. T.L. James Co.*, 702 F.2d 1023, 1025 (5th Cir. 1983). Where the action taken by the municipality or its authorized decision maker violates federal law, the municipality will be held to be the moving force behind the injury complained of. That is the situation in the case at bar. *Bryan County*, 117 S. Ct. at 1389.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment of the Fifth Circuit.

Respectfully submitted,

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Jose GRACIA, et al., Plaintiffs-Appellants, Cross-Appellees,

and

Healthsouth Rehabilitation Center, Intervenor-Appellant, Cross-Appellee,

v.

BROWNSVILLE HOUSING, et al., Defendants-Appellees, Cross-Appellants.

No. 94-60449.

United States Court of Appeals, Fifth Circuit.

Feb. 14, 1997.

Parent of children visiting housing project sued city, housing authority, and housing authority officials after decayed tree fell on children, alleging negligence and § 1983 claims. The United States District Court for the Southern District of Texas, Filemon B. Vela, J., entered judgment for defendants. Parent appealed. The Court of Appeals held that: (1) housing authority was covered by Texas Tort Claims Act, and (2) Fair Housing Act and its implementing regulations did not confer on children any enforceable rights that could form basis of § 1983 claim.

Affirmed.

Dennis, Circuit Judge, filed a concurring opinion.

Fred L. Streck, III, Dwain Dent, Dent Lawfirm, Fort Worth, TX, Denning Schattman, Fort Worth, TX, J. Stewart

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W. Michael Fisher, Brownsville, TX, for City of Brownsville.

Appeal from the United States District Court for the Southern District of Texas.

Before KING, JOLLY and DENNIS, Circuit Judges.

PER CURIAM:

This appeal arises from a terrible accident. In the summer of 1988, the Jose Gracia family was visiting Ezequiel Gracia, a relative, who was a resident of the Victoria Gardens Housing Project, a public housing project in Brownsville, Texas. During the visit, four children were playing in Mr. Gracia's hammock, which was strung between two trees near his apartment. One of the trees, a decayed avocado tree over twenty feet high, collapsed and fell on the children. One of Jose Gracia's children was

killed and another suffered paralysis and permanent brain damage. This case presents the primary question, as it relates to jury instructions, whether the Brownsville Housing Authority ("BHA") was covered under the Texas Tort Claims Act at the time of the accident. The answer to this question determines the standard of care the BHA owed to the Gracia children.

I

Jose Gracia ("Gracia") initially filed this action in state court seeking damages under Texas landlord/tenant principles. The case was removed to federal court when Gracia added a claim under 42 U.S.C. § 1983. Gracia named the following defendants: the BHA; the City of Brownsville[1]; Raul Trevino ("Trevino"), individually and as Executive Director of the BHA; and Genovevo Rubalcaba ("Rubalcaba"), individually and as Superintendent of Maintenance of the BHA.

The BHA moved for summary judgment but the district court denied the motion. The case then went to trial and was submitted to the jury on special interrogatories. The jury found no liability. The court then granted a directed verdict in favor of the individual defendants in their individual capacities and entered judgment dismissing the complaint. Gracia's motion for a new trial was denied.

On appeal, Gracia argues first, that, with respect to the state law claims, the jury charge did not state the

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[1] The City of Brownsville settled prior to trial and was dismissed from this action.

correct standard of care; second that, with respect to the section 1983 claim, the jury instructions incorrectly conditioned consideration of the claim upon a finding of state law negligence; and, finally, that, with respect to the individual defendants, the directed verdict was error. The BHA filed a cross-notice of appeal asserting that the district judge erred in denying the BHA summary judgment on Gracia's section 1983 claim. These appeals are now before the court.

II

A

The initial point we address is whether the first interrogatory submitted to the jury correctly stated the applicable standard of care owed by the BHA to the Gracia children.[2] Specifically, we ask: Did the defendants' duty of care to the visiting Gracias arise only if the defendants had actual knowledge of the danger posed by the tree or did the duty of care arise if the defendants had constructive knowledge of the danger, i.e., if the defendants, by the exercise of reasonable care, should have known of the

---

[2] The first interrogatory read:

> Do you find from a preponderance of the evidence that any of the named Defendants were negligent?
>
> You are instructed that any of the individuals named were negligent if:
>
> A) The tree posed an unreasonable risk of harm; and
>
> B) *The Defendants knew of the danger;* and
>
> C) The Defendants failed to exercise ordinary care to eliminate the danger.

danger. The district court instructed the jury that the defendants must have possessed actual knowledge of the dangerous tree in order to be held liable. Whether the district court erred in its actual knowledge instruction depends upon whether the Texas Tort Claims Act applied to the BHA at the time of the accident.[3]

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[3] The Texas Tort Claims Act provides:

> § 101.022. Duty Owed: Premise and Special Defects
>
> a) If a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises.

Tex. Civ. Prac. & Rem.Code Ann. § 101.022 (West 1986). A private person owes a licensee only the duty to refrain from "injur[ing] a licensee by willful, wanton or grossly negligent conduct, and [to] use ordinary care either to warn a licensee of, or to make reasonably safe, *a dangerous condition of which the owner is aware* and the licensee is not." *See State Dep't of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex.1992) (emphasis added).

If the Act does not apply, the BHA stands in the shoes of a private litigant. The standard of care for private persons in the landlord/tenant context is stated in *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 515 (Tex.1978). In *Parker*, the court held that a landlord owed the following duty with respect to areas of leased premises that lessees were entitled to use even though they remained in the landlord's control:

> A possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, *if the lessor by the*

The plaintiffs argue that the BHA, at the time of this accident, did not come within the scope of the Texas Tort Claims Act because the BHA was not a unit of government under the terms of the statute; instead, the BHA was only a subdivision of the city, and it performed only a proprietary – not a governmental – function.[4] We do not agree.[5]

We first turn to examine the applicable law at the time the accident occurred in the summer of 1988. Under the Texas Tort Claims Act, then and now, an "institution,

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exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.

Parker, 565 S.W.2d at 515 (quoting Restatement (Second) of Torts § 360) (emphasis added).

[4] Under the Texas Tort Claims Act, a city is protected by the statute only with respect to the performance of governmental functions, not the performance of proprietary functions. Tex. Civ. Prac. & Rem.Code Ann. § 101.0215(a) (West 1996).

[5] Under current Texas law, there is no question but that the BHA is covered under the Texas Tort Claims Act. In August 1989, a statute was enacted specifically providing that "[f]or all purposes, including the application of the Texas Tort Claims Act . . . , a housing authority is a unit of government and the functions of a housing authority are essential governmental functions and not proprietary functions." Tex. Local Gov't Code Ann. § 392.006 (West Supp.1997). Gracia argues that this statute is inapplicable because this cause of action accrued prior to its effective date. The BHA counters that the statute is merely a codification of preexisting law and that the BHA has always been a unit of government for purposes of the Texas Tort Claims Act. Alternatively, the BHA argues that the statute applies to all actions filed after its effective date and, therefore, applies to this action. We find it unnecessary to address the applicability of this statute to the present action.

agency, or organ of government the status and authority of which [is] derived from the Constitution of Texas or from laws passed by the legislature under the constitution" is considered a unit of government. Tex. Civ. Prac. & Rem.Code Ann. § 101.001(2)(D) (West 1986). The statute creating housing authorities reads, in relevant part,

> (a) A housing authority is created in each municipality in the state.
>
> (b) A municipal housing authority is a public body corporate and politic.
>
> (c) A municipal housing authority may not transact business or exercise its powers until the governing body of the municipality declares by resolution that there is a need for the authority.

Tex. Local Gov't Code Ann. § 392.011 (West 1988).[6] Thus, a housing authority is created by the Texas legislature as an entity independent of the city and thereafter, the respective city, also through a legislative grant of power, activates the housing authority. Applying this statute to the definition of a governmental unit in the Act, it seems quite clear that the BHA is an agency that derives its status and authority from an act of the Texas legislature. It is true, of course, that this status and authority lies dormant until the city acts. This power of the city that activates the housing authority, however, derives from a grant from the legislature. Thus, in every sense, it can be said that all status and authority enjoyed by the housing

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[6] This statute was enacted as Acts 1987, 70th Leg. Ch. 149, § 1 and took effect on September 1, 1987. Thus, the statute was in effect at the time of the accident at issue.

authority is derived from the Texas legislature. Consequently, the BHA is covered under the Act.

Indeed, this appeal presents a case that is closely analogous to *Huckabay v. Irving Hosp. Auth.*, 879 S.W.2d 64 (Tex.App.1993). There, the court held that the hospital authority was a unit of government for purposes of the Tort Claims Act, because the authority fell within the definition of "governmental unit" under the Act. *Id.* at 66. *See also Edinburg Hospital Authority v. Trevino*, No. 95-0939, 1997 WL 47912 (Tex.1997). Specifically, the court found that the City of Irving had created the Authority pursuant to a statute authorizing such entities and that, therefore, the Authority was an "institution, agency or organ of government the status and authority of which [was] derived from the constitution of Texas or from laws passed by the legislature under the constitution." *Id.* The BHA occupies a position which, in its essence, is the same as the Hospital Authority in *Huckabay*.

It therefore seems indisputable that the BHA falls within the express terms of the Texas Tort Claims Act. Because we conclude that the BHA is entitled to the protection of the Texas Tort Claims Act, we find that the jury interrogatory correctly stated the standard of care owed by the BHA to the visiting Gracias.

B

As we have noted, the case was submitted to the jury on special interrogatories. The first interrogatory, discussed above, asked the jury whether any of the defendants were negligent. The jury instructions then conditioned consideration of Gracia's section 1983 claim

upon a finding of negligence. Specifically, the jury was instructed not to consider or answer any additional interrogatories unless the first interrogatory on negligence was answered in the affirmative.

Gracia contends that the interrogatory conditioning the jury's consideration of the section 1983 federal claim upon a finding of negligence under state law was erroneous. We will assume, without deciding, that the instruction was erroneous. We nevertheless conclude that, because Gracia failed to establish a prima facie case under section 1983, any error was harmless under Federal Rule of Civil Procedure 61.[7]

Gracia's section 1983 claim, in its essence, alleges that the defendants deprived his children of a right under federal law to have the housing project maintained in a safe condition. We reject this basis as being insufficient to state a claim under section 1983. Indeed, we find that the Fair Housing Act and its implementing regulations, relied upon by Gracia, do not confer on the visiting Gracia children any enforceable rights.

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[7] Federal Rule of Civil Procedure 61 reads,

> No error . . . or defect . . . in anything done or omitted by the court . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

We first look to the relevant portion of section 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws shall be liable to the party injured in an action at law. . . .

In *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), the Court recognized that section 1983 provided a cause of action to redress violations of federal statutes and not solely violations of the Constitution. No cause of action exists, however, "where the statute in question does not 'create enforceable rights, privileges, or immunities within the meaning of section 1983.' " *Suter v. Artist M.*, 503 U.S. 347, 365, 112 S.Ct. 1360, 1371, 118 L.Ed.2d 1 (1992) (quoting *Wright v. Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 423, 107 S.Ct. 766, 770, 93 L.Ed.2d 781 (1987)).

Gracia alleged a right, or rights, derived from federal regulations enacted pursuant to the Fair Housing Act. Gracia's argument is defective in several respects.

First, it is not clear that regulations can be considered "laws" for purposes of creating a right actionable under section 1983. *See, e.g., Wright v. Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418, 437-39, 107 S.Ct. 766, 778, 93 L.Ed.2d 781 (1987) (O'Connor, J., dissenting).

Second, even if regulations may create actionable rights, there is no evidence that any of the cited regulations have been violated by the BHA or its employees. Gracia specifically relies upon 24 C.F.R. § 966.4. This regulation, however, only requires that certain provisions be contained in leases entered into under the Act. *See* 24 C.F.R. § 966.4 (stating "[a] lease shall be entered into between the [public housing agency] and each tenant- . . . which shall contain the provisions described hereinafter"). Although it is true that the regulation requires that a provision be included in the lease requiring the housing agency to maintain common areas in a safe condition, there is no evidence that the BHA failed to include the provision in the subject lease. *See* 24 C.F.R. § 966.4(e)(4). In fact, the lease between Ezequiel Gracia and the BHA contained a provision that stated,

> [t]he authority agrees to keep the building facilities, common areas and grounds not otherwise assigned to the Tenant for maintenance and upkeep, in a clean and safe condition and to make necessary repairs to the premises.

It appears that the failure to comply with this term of the lease may give rise to a breach of contract action in favor of Ezequiel Gracia. This provision, however, does not give rise to a section 1983 action in favor of persons who are not even parties to the lease.

This point brings us to a third problem with Gracia's claim under the regulations: His children are not within the scope of the regulations that allegedly create the federal right upon which he relies. The Gracia children were not residents of the housing project and so the obligations of the BHA do not run to them. Gracia

attempts to rely upon 24 C.F.R. § 966.4(d)[8] to support his claim, but that provision only requires that, with respect to use and occupancy rights, the lease recognize the *tenant's* right to make "reasonable accommodations" for his guests and does not confer any enforceable rights upon the Gracia children.

In sum, we conclude that Gracia failed to state a prima facie case under section 1983 because he failed to demonstrate that any act or failure to act by the BHA deprived his children of any rights to which they were entitled under federal law. Thus, any error that occurred as a result of the trial court's structuring of the jury interrogatories on the section 1983 claim was harmless.

III

In conclusion, we hold that the jury was properly instructed with respect to Gracia's state law negligence claim because the Texas Tort Claims Act encompasses the BHA and, thus, the applicable standard of care was set out in the jury interrogatory. Additionally, we conclude that any error in connection with the instructions regarding Gracia's section 1983 claim was harmless because

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[8] This regulation is titled "Tenant's right to use and occupancy" and reads, in relevant part:

> The lease shall provide that the tenant shall have the right to exclusive use and occupancy of the leased unit by the members of the household authorized to reside in the unit in accordance with the lease, including reasonable accommodation of their guests.

24 C.F.R. 966.4(d)(1).

Gracia failed to state a viable claim under the section.[9] The judgment of the district court is therefore

AFFIRMED.

DENNIS, Circuit Judge, concurring:

While I concur in the result reached by the majority, I am troubled by the disposition of the § 1983 claim against the authority in Section II(B) of the majority opinion. In *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987), the Supreme Court held that tenants living in low-income housing projects owned by a public housing authority, who alleged that the housing authority over-billed them for their utilities and thereby violated a rent ceiling imposed by the Brooke Amendment to the Housing Act of 1937 (42 U.S.C. § 1437(a)) and the implementing regulations of the federal Department of Housing and Urban Development (HUD), have a private cause of action under 42 U.S.C. § 1983. The Court stated: "In our view, the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under *Pennhurst* and § 1983, rights that are not, as respondent suggests, beyond the competence of

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[9] Our holdings as to the first two issues on appeal moot Gracia's third point of error – that the trial judge erred in granting directed verdicts in favor of the individual defendants in their individual capacities. Gracia failed to state a claim under section 1983, thus, there could be no individual liability as to that claim. The state law claims were premises liability claims, and because neither Trevino nor Rubalcaba were possessors of the property they owed no individual duty to the Gracia children.

the judiciary to enforce." *Id.* at 432, 107 S.Ct. at 774-75 (footnote omitted).

I understand that we are dealing here with a different section of the Housing Act of 1937 and a different implementing regulation, but the *Wright majority* held, however, that nothing in the Housing Act or the Brooke Amendment evidences that Congress intended to preclude the tenants' § 1983 claims against the authority, and that the provision in the HUD regulations for a "reasonable" allowance for utilities was sufficiently specific and definite to qualify as enforceable rights under *Pennhurst* and § 1983. I am uncomfortable in relying partially on the *Wright* dissent, as the majority opinion does, in a case under the same Act and in not closely following or applying by analogy the *Wright* majority's analysis to the Act's provisions and the HUD regulation at issue in our case. I realize that the Supreme Court now follows a different approach and does not easily recognize implied private causes of action under federal statutes, but I do not believe we should apply the new approach to a provision of the Housing Act and a regulation thereunder in view of *Wright*.

Instead, we should hold simply that the Gracias failed to establish a prima facie case under § 1983 because under *Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), and *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), no reasonable juror could have found that the housing authority's policy makers were "deliberately indifferent" to the safety needs of the tenants with respect to the condition of trees on the premises. In light of the above observations, the judgments in favor of

Trevino and Rubalcaba should be affirmed on the basis of the Texas Tort Claims Act § 101.106, lack of personal participation, and their qualified immunity.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

JOSE and MARY GRACIA, et al Plaintiff, vs. BROWNSVILLE HOUSING AUTHORITY, et al, Defendant.	§ § § § § § § §	CIVIL ACTION NO. B-91-146

JUDGMENT

(Filed May 4, 1994)

This action came on for trial before the Court and Jury, the Honorable Filemon B. Vela, United States District Judge, presiding.

The Court noted earlier in this action that one of the Defendants, the CITY OF BROWNSVILLE had settled and was ordered dismissed.

Upon motion during the pendency of the trial, the Court granted a directed verdict and judgment in favor of Defendants, RAUL TREVINO and GENOVEZO RUBALCABA in their individual capacities only.

Thereafter, the issues having been duly tried, the jury rendered its verdict in favor of the remaining Defendants, BROWNSVILLE HOUSING AUTHORITY, RAUL TREVINO, and GENOVEZO RUBALCABA in their official capacities, which was received by the Court on Monday, March 21, 1994.

Accordingly, it is HEREBY ORDERED, ADJUDGED, and DECREED by the Court that the Plaintiffs take nothing, that the action be dismissed on the merits and that the Defendants recover of the Plaintiffs their respective costs of court.

Lastly, it is ORDERED, ADJUDGED and DECREED that all relief not expressly granted herein with regard to BROWNSVILLE HOUSING AUTHORITY, RAUL TREVINO, and GENOVEZO RUBALCABA is HEREBY DENIED.

DONE at Brownsville, Texas this 4th day of May, 1994.

/s/ Filemon B. Vela
FILEMON B. VELA
United States District
Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60449

JOSE GRACIA, ET AL.,
Plaintiffs-Appellants,
Cross Appellees,

and

HEALTHSOUTH REHABILITATION CENTER,
Intervenor-Appellant,
Cross Appellee,

versus

BROWNSVILLE HOUSING, ET AL.,
Defendants-Appellees,
Cross Appellants.

Appeals from the United States District Court
for the Eastern District of Texas, Tyler

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 2/14/97, 5 Cir., 1997, ___ F.3d ___)

(Filed Apr. 23, 1997)

Before KING, JOLLY, and DENNIS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Gordy Jolly
United States Circuit Judge

DWELLING LEASE

Account No.: # 15 No. of Bedrooms 2-Br.

Project/Site: Victoria Gardens

1. DESCRIPTION OF PARTIES & PREMISES: The Housing Authority of the City of Brownsville, Texas: (hereinafter called the Authority) does hereby lease to Mr. Esequiel Gracia (hereinafter called the Tenant) the premises located at 1817 Lincoln Street Brownsville, Texas 78520 for the initial term starting April 1, 1985 and ending at midnight on April 30, 1985 at a rental of $ 185.00 for such initial term, under the terms and conditions stated herein. The premises leased are for the exclusive use and occupancy of the Tenant and his household consisting of the following named individuals who will reside in the dwelling unit:

Esequiel Gracia (Head)	_____
Santos Gracia (Brother)	_____
_____	_____
_____	_____
_____	_____

2. AMOUNT AND DUE DATE OF RENTAL PAYMENT: This lease shall be automatically renewed (except as specified in Section I) for successive terms of one month at a rental of $ 185.00 payable in advance at the office of the Authority on the first calendar day of each month beginning May 1, 1985 : This rent will remain in effect unless adjusted in accordance with Section 6 hereof.

3. SECURITY DEPOSIT: Tenant agrees to pay $ 50.00 as a Security Deposit to be used by the Authority at the Termination of this lease toward reimbursement of the cost of cleaning and repairing any damages beyond normal wear and tear to the

dwelling unit caused by Tenant, his family dependents, or guest and any rent or other charges owed by Tenant. Any refund of Security Deposit due the Tenant will be refunded within thirty (30) days after the Tenant yields possession.

4. UTILITIES: The Authority agrees to furnish utilities as provided in the current Utility Allowances posted in the Authority's office except on projects where tenants pay all or most of the utilities. Utilities used in excess of that authorized will be charged to the Tenant at the actual cost to the PHA, as posted in the Utility Allowances and will be payable on the first day of the second month in which the charges are accrued. The Authority will not be responsible for failure to furnish utilities by reasons of any cause beyond its control. Tenant agrees to maintain sufficient heat to prevent freezing of piped water. If for any reason, Tenant is unable to maintain sufficient heat, he shall immediately notify the Authority. Any damage to Tenants premises resulting from such failure to provide immediate notice shall be deemed to have been caused by the Tenant for the purpose of applying Section 10 of this lease.

5. EQUIPMENT: The Authority agrees to furnish a range and a refrigerator in working order.

6. RE-DETERMINATION OF RENT, DWELLING SIZE AND ELIGIBILITY: Once each year Tenant agrees to furnish such information and certification regarding family composition and income as requested by the Authority for the purpose of determining Tenant's rent, eligibility, and appropriateness of dwelling size. This determination will be made in accordance with the Authority's "Schedule of Income Limits", and "Statement of Policies Governing Admissions and Continued Occupancy of Low Rent Public Housing" which are posted in the

Authority's office. Any rent charged as result of the re-determination outlined above, will become effective on the established anniversary date. Failure by tenant to provide truthful information on income or family composition shall constitute a violation of this Lease.

A. Rent as fixed in Section 2 hereof or as adjusted pursuant to the above will remain in effect for the period between regular rent re-determination unless during such period:

(1) Family circumstances change as follow:

(a) Decline in income which would justify a reduction in rent

(b) Change in family composition; or

(c) Such other circumstances as would create a hardship situation.

(2) It is found that Tenant has misrepresented to the Authority facts upon which his rent is based, so that the rent he is paying is less than he should have been charged. If this is found then the increase in rent will be made retroactive.

In the event of any rent adjustment pursuant to the above, the Authority will mail or deliver a "Notice of Rent Adjustment" to Tenant in accordance with Section 13 hereof. In the case of rent decreases, the adjustment will become effective the first of the following month. In case of rent increases, the adjustment will have effect the first of the following month, unless the rent increase results from finding of intentional misrepresentations under 6A (2) above.

The Tenant agrees to pay adjusted rents and back charges, if any, in accordance with approved "Schedule of Rents and Other Charges" and to accept a "Notice of Rent Adjustment" delivered as prescribed in Section 13.

B. If the Authority determines that size of the dwelling unit is no longer appropriate, Tenant will be notified in accordance with Section hereof, to transfer to the appropriate size dwelling unit when such unit is available.

C. The Authority shall not commence eviction proceedings, or refuse to renew a lease, based upon the income of the tenant family unless it has identified, for possible rental by the family, a unit of decent, safe and sanitary housing of suitable size available at a rent not exceeding the rent-income ratio as defined by the Authority for the purpose of determining rents, in accordance with 24 CFR 860, Subpart D, or 2) it is required to do so by local law. Pending their removal from the project such families are to be charged rents calculated on the percentage of total family income for rent purposes as defined by HUD Regulations and the Housing Authority.

8. OCCUPANCY OF THE DWELLING UNIT AND TENANTS OBLIGATIONS: Tenant agrees to sublet or transfer possession of the premises; nor to give accomodation [sic] to boarders or lodgers. Tenant further agrees not to use permit the use [sic] of dwelling unit for any purpose other than a private dwelling unit solely for Tenant and the Tenant's household as identified in this lease. This provision does not exclude accommodation of Tenant's guests or visitors for fourteen (14) days with written consent of the Authority and may include care of foster

child and live-in care for a member of the Tenant's family. Tenant agrees to abide by such necessary and reasonable regulation as may be promigated [sic] by the Authority for the benefit and well-being of the housing project and the Tenants which shall be posted in the Authority office and incorporated by reference in this lease. Tenant further agrees:

(a) To comply with all obligations imposed upon Tenants by applicable provisions of building and housing codes materially affecting health and safety;

(b) To keep the premises and such other areas as may be assigned to him for his exclusive use in a clean and safe condition;

(c) To dispose of all ashes, garbage, rubbish, and other waste from the premises in a sanitary and safe manner;

(d) To use only in reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appurtenances including elevators;

(e) To refrain from and to cause his household and guests to refrain from destroying, defacing, damaging, or removing any part of the premises or project;

(f) To pay reasonable charges (other than for normal wear and tear) for the repair of damages to the premises project buildings, facilities or common areas caused by the tenant, his household or guests;

(g) To conduct himself and cause other persons who are on the premises with his consent to conduct themselves in a manner which will not

disturb his neighbor's peaceful enjoyment of their accommodations and will be conductive to maintaining the project in decent, safe and sanitary condition;

(h) To refrain from illegal or other activity which impairs the physical or social environment of the project;

(i) To leave the dwelling unit in a clean and good condition upon vacating, reasonable wear and tear excepted, and to return the [illegible];

(j) Not to keep pets such as cats, dogs, animals, etc., in the dwelling unit or on the premises;

(k) Not to use firearms, BB guns, or pellet [illegible] Authority property;

(l) Tenant agrees to transfer to an appropriate [illegible] and, based on family composition, upon [illegible] by the Authority that such a dwelling and is available;

(m) The tenant, member of the household and guests shall not park their vehicles anywhere else but the parking areas on the streets;

(n) The Tenant shall not carry on any business whatever not display signs of any type in or about the premises;

(o) The Tenant shall not use or keep inflammable materials on the premises or in storage rooms nor use any method of heating other than that supplied by the Authority;

(p) No nails, bolts, or screws shall be placed in the walls, floors, doors or trim, and all electric wiring shall be done or supervised by the Authority;

(q) The Authority in all cases shall retain the right to control and prevent access into the building and ground of all persons whom it considers undesirable;

(r) All personal property placed on the premises shall be at the risk of the Tenant or owner of such personal property and the Owner will not be responsible for any damage to such personal property from any cause.

9. AUTHORITY'S OBLIGATION ON MAINTENANCE AND REPAIR:

A. The Authority agrees to keep the building facilities, common area and grounds, not otherwise assigned to the Tenant for maintenance and upkeep, in a clean and safe condition and to make necessary repairs to the premises. The Authority further agrees to:

(1) To comply with requirements of applicable building codes, housing codes and HUD regulations materials affecting health and safety.

(2) To maintain in good and safe working order and condition electrical plumbing, sanitary, heating, ventilating and other facilities and appliances, including elevators, supplied or required to be supplied by the PHA;

(3) To supply running water and reasonable amounts of hot water and reasonable amounts of heat at appropriate times of the year (according to local custom and usage) except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or where heat or hot water is generated by an installation

within the exclusive control of the Tenant and supplied by a direct utility connection; and

(4) To maintain the premises and the project in decent, safe and sanitary condition.

B. The Authority may authorize a Tenant by "Written Rider" hereto specifying the task, in accordance with Section 15 hereof, to perform seasonal maintenance or other maintenance tasks, as permitted by the nature of the design and construction of the dwelling and according to local custom, provided that such agreement is made in good faith and not for the purpose of evading the obligations of the Authority.

C. Maintenance and repair work (beyond normal wear and tear) caused by the Tenant, his household or guests, will be charged to the Tenant. Such charges shall be billed at a rate as specified in the "Schedule of Charges for Maintenance and Repair" as posted in the Authority's office. Payment for such charges are due and payable on the first day of the second month following the month in which the charge is made.

10. DEFECTS HAZARDOUS TO LIFE, HEALTH – SAFETY: When conditions are created which are hazardous to life, health, or safety of the occupants, the Tenant shall immediately notify the Authority of the damage. The Authority shall be responsible for the repair of the unit within a reasonable time, provided, that if the damages were caused by the Tenant, Tenant's household or guests, the reasonable cost of the repairs shall be charged to the Tenant, payable on the first day of the second month following the month in which the charges are made.

If repairs of the defects or damages cannot be made within a reasonable time, the Authority shall offer standard alternative accommodations, if available, in the event the Authority fails to fulfill its responsibility the Tenant's rent shall abate in proportion to the seriousness of the damages and loss in value as a dwelling except the cost of utilities furnished by the Authority shall not abate. Rent shall not abate if the Tenant rejects the alternative accommodations or if the damages were caused by the Tenant, Tenant's household or guests.

11. INSPECTION: Before occupancy by the Tenant, the Authority and the Tenant or his representative shall inspect the dwelling unit and the Tenant will receive a written statement of the condition of the unit and the equipment furnished therein. Tenant agrees that the authorized agent, employee or representative of the Authority will be permitted to enter Tenant's dwelling unit for the purpose of performing routine inspection, maintenance and for making improvement and repairs, or to show the premises for releasing. Such entry may be made only during reasonable hours after a two day advance notice in writing to the Tenant of the time, date and purpose, provided however, the Authority shall have the right to enter Tenant's dwelling unit without prior notice to Tenant if the Authority reasonably believes that an emergency exists which requires such entry. The Authority shall leave on the premises a written statement specifying the date, time and purpose of entry prior to leaving the premises whenever entry is made when the Tenant and all adult members of the household are absent. When the Tenant vacates, the Authority will inspect the dwelling unit and give the Tenant a written statement of the charges, if any for which the Tenant is responsible. Tenant and or his representative may join in such inspection.

12. TERMINATION OF LEASE: This lease may be terminated by the Authority at any time by giving a written notice as set forth in Section 13, except that such written notice may only be given for serious or repeated violations of material terms of the lease such as failure to make payments due under the lease or to fulfill the Tenant's obligations set forth in Section 8 or for other good cause. If the Authority should elect to terminate this lease, the written notice of termination must be given:

(a) Fourteen (14) days in advance in the case of failure to pay rent;

(b) A reasonable time depending on the seriousness of the situation in the case of creation or maintenance of a threat or safety of other Tenants or Authority employees; and

(c) Thirty (30) days in all other cases.

The notice of termination of the Tenant shall state reasons for termination and shall inform the Tenant of his right to:

(a) Make such a reply as he may wish; and

(b) Request a hearing in accordance with the Authority's Grievance Procedure.

THE TENANT MAY TERMINATE THIS LEASE AT ANY TIME BY GIVING FIFTEEN (15) DAYS WRITTEN NOTICE IN THE MANNER SPECIFIED IN SECTION 13 OR BY NOTIFYING THE AUTHORITY IN PERSON AT THE OFFICE OF THE AUTHORITY. IF THE TENANT DOES NOT GIVE THE AUTHORITY FIFTEEN (15) DAYS NOTICE, THE AUTHORITY MAY CHARGE THE TENANT FOR ANY VACANCY LOSS. THE HOUSE KEYS MUST BE ALSO PROMPTLY RETURNED TO AVOID ANY ADDITIONAL RENTAL CHARGES.

Notice by either party to this lease may be given on any day of the month.

13. LEGAL NOTICES: Any notice required hereunder will be sufficient if delivered in writing to Tenant personally or to an adult member of his family resident in the dwelling unit, or is sent by certified mail return receipt requested properly addressed to Tenant. Notice to the Authority must be in writing, and either delivered to the office of the Housing Authority, or sent to the Authority by prepaid first class mail.

14. GRIEVANCE PROCEDURE: All grievances or appeals arising under this lease shall be processed and resolved pursuant to the Grievance Procedure of the Authority, which procedure is posted in the Authority's office and incorporated herein by reference.

15. CHANGES: This lease, including any future adjustments of rent or dwelling unit, is the entire agreement between the Authority and Tenant. No change herein shall be made except by a Written Rider, signed and dated by both parties, other than with respect to the "Notice of Rent Adjustment" as provided in Section 6 hereof.

IN WITNESS HEREOF, the parties have executed this lease Agreement this 1st day of April 1985 at Brownsville, Texas
(State)

HOUSING AUTHORITY OF THE CITY OF BROWNSVILLE, TEXAS

✔ /s/ Esequiel Gracia
(Tenant)

By: /s/ Frances ReMeza
Authorized
Representative

A RESOLUTION FINDING AND DECLARING THAT THERE EXISTS A NEED FOR THE HOUSING AUTHORITY OF THE CITY OF BROWNSVILLE, TEXAS, TO FUNCTION, AND DECLARING AN EMERGENCY.

BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF BROWNSVILLE:

Section 1: The City Commission of the City of Brownsville, Texas, hereby determines, finds and declares in pursuance of the Housing Authorities Law of the State of Texas, that:

(a) Insanitary and unsafe inhabited dwelling accommodations exist in the City of Brownsville, Texas; and

(b) There is a shortage of safe and sanitary dwelling accommodations in the City of Brownsville, Texas, available to families of low income at rentals they can afford; and

(c) There is need for the Housing Authority of the City of Brownsville, Texas, to function.

Section 2: In accordance with the foregoing finding, the Housing Authority of the City of Brownsville is authorized to transact business and exercise its power pursuant to the Housing Authorities Law of the State of Texas.

Section 3: The Mayor of said City, be, and he is hereby directed to file the necessary certificate relative to the appointment of the commissioners and designation of the first chairman of said Housing Authority in the office of the County Clerk of Cameron County, Texas.

Section 4: There exists a public emergency requiring that this resolution be passed finally on the date of its

introduction, and the Mayor having in writing declared the existence of such emergency and requested such passage, this resolution shall be passed finally on the date of its introduction, on this 24th day of March, A.D. 1936, and shall take effect immediately upon its passage and approval by the Mayor.

Passed this the 24th day of March, A.D. 1938.

Approved this the 24th day of March, A.D. 1938.

R.B. Rentfro
Mayor of the City of Brownsville.

Approved:

R.A. Dunkelberg
City Attorney.

CERTIFICATE OF APPOINTMENT OF COMMISSIONERS AND DESIGNATION OF THE FIRST CHAIRMAN OF THE HOUSING AUTHORITY OF THE CITY OF BROWNSVILLE, TEXAS.

WHEREAS, the City Commission of the City of Brownsville, Texas, held a duly authorized regular meeting on the 24th day of March, A.D. 1938, at which meeting the following resolution was passed and adopted:

BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF BROWNSVILLE:

Section 1: The City Commission of the city of Brownsville Texas, hereby determines, finds and declares in pursuance of the housing Authorities Law of the State of Texas, that:

(a) Insanitary and unsafe inhabited dwelling accommodations exist in the City of Brownsville, Texas; and;

(b) There is a shortage of safe and sanitary dwelling accommodations in the City of Brownsville, Texas, available to families of low income at rentals they can afford; and

(c) There is need for the housing Authority of the City of Brownsville, Texas, to function.

Section 2: In accordance with the foregoing finding, the Housing Authority of the City of Brownsville is authorized to transact business and exercise its power pursuant to the Housing Authorities Law of the State of Texas.

Section 3: The Mayor of said City be, and he is hereby directed to file the necessary certificate relative to the appointment of the commissioners and designation of the first chairman of said Housing Authority in the office of the County Clerk of Cameron County, Texas.

Section 4: There exists a public emergency requiring that this resolution be passed finally on the date of its introduction, and the Mayor having in writing declared the existence of such emergency and requested such passage, this resolution shall be passed finally on the date of its introduction, on this 24th day of March A.D. 1938, and shall take effect immediately upon its passage and approval by the Mayor.

NOW THEREFORE, pursuant to the provisions of said resolution and of Section 5 of the "Housing Authorities Law" of the State of Texas, approved on the 3rd day of November, 1937, and by virtue of my office as Mayor:

I hereby appoint the five (5) persons hereinafter named to serve as commissioners of the housing Authority of the City of Brownsville, and to serve for the number of years appearing after their names respectively from the 24th day of March, 1938:

John Pipkin---------- ONE YEAR
Mrs. Volney W. Taylor----------ONE YEAR
Roger J. Seaman----------TWO YEARS
J. M. Stain---------- TWO YEARS
Chas. A. Burton, Chairman----TWO YEARS

I hereby certify that none of the above designated members are city officials.

I hereby designate Chas. A. Burton to serve for two years as the first Chairman of the Housing Authority of the City of Brownsville.

IN WITNESS WHEREOF, I have hereunto signed my name as Mayor of the City of Brownsville, Texas, and caused the official corporate seal of said City of Brownsville to be attached hereto this 25th day of March, 1938.

R. B. RENTFRO, MAYOR.

ATTEST:

Kermit Cromack
City Secretary.

(SEAL) CERTIFICATE OF MAYOR

I, R. B. RENTFRO, Mayor of the City of Brownsville, Texas, hereby certify that the foregoing certificate was

duly filed in the office of the City Clerk on the 25th day of March, 1938.

R.B. RENTFRO, MAYOR.

Date: March 25th, 1938.

CERTIFICATE OF THE CLERK OF THE CITY OF BROWNSVILLE, TEXAS.

RE: FILING OF CERTIFICATE OF APPOINTMENT

I HEREBY CERTIFY that on the 25th day of March, 1938, a Certificate of Appointment of Commissioners and Designation of the First Chairman of the Housing Authority of the City of Brownsville, was duly filed with the Clerk of the City of Brownsville, said certificate being dated March 25th, 1938, and signed by the mayor of said City and that attached hereto is a true, correct and compared copy of the original Certificate of Appointment and Designation which is now on file in the office of the Clerk of the City of Brownsville, Texas.

WITNESS my hand this 24th day of June, 1938.

Kermit Cromack
Clerk.

(SEAL)

A general discussion was had regarding the Housing Act and the general setup as provided by the National Housing Authority of a Local Housing Authority.

Mr. Seaman explained the result of his visit to San Antonio with Mr. Oliver Winston, a representative of the

N.H.A., and upon motion of Stein, seconded by Taylor, the following resolution was adopted:

RESOLUTION NO. 3.

A RESOLUTION FINDING AND DECLARING THAT THERE EXISTS THE NEED IN THE CITY OF BROWNSVILLE, TEXAS, FOR THE DEVELOPMENT AND CONSTRUCTION OF SUITABLE HOUSING FOR PERSONS OF LOW INCOME.

BE IT RESOLVED BY THE BROWNSVILLE HOUSING AUTHORITY OF THE CITY OF BROWNSVILLE, TEXAS:

That there now exists insanitary and unsafe inhabited dwelling accommodations in this community and that there is a shortage of safe and sanitary dwelling accommodations in the City of Brownsville, Texas, available to families of low income at rentals they can afford.

That it is the intention of the Housing Authority of the City of Brownsville to attempt to work out, under the authority given it by the Housing Act of the State of Texas, and in conjunction with the Federal Housing Authority, a program of development to improve the conditions as outlined above; and

In accordance with this intention the Housing Authority of the City of Brownsville, Texas, desires to make application to the Federal Housing Authority, Washington, D.C., for the ear-marking of a sum not in excess of $500,000.00, and unanimously instructs the Secretary to make formal application to the Federal Housing Authority for the ear-marking of said amount, subject to

the development of properly approved plans, specifications and contracts and the approval of the Federal Housing Authority.

BROWNSVILLE HOUSING
AUTHORITY

By (Signed) CHAS. A. BURTON
President

By (Signed) R.J. SEAMAN
Secretary.

Unanimously adopted this 2nd day of April, A.D. 1938.

HOUSING AUTHORITY
OF THE
CITY OF BROWNSVILLE, TEXAS

MANUAL OF OPERATIONS

HOUSING AUTHORITY OF THE CITY OF BROWNSVILLE, TEXAS

THE MAINTENANCE PLAN

PURPOSE

The maintenance plan has been designed to establish plant guide lines for the Housing Authority staff to carry out an organized maintenance program. This plan supplements Operations Manual Part VIII, Maintenance of Physical Properties, in order to define categories of maintenance and outline in detail the preventative maintenance procedures including fire safety inspections. This plan also incorporates procedures for details in the handling of work orders, inspections and inspection forms, spot checks, vacant units, maintenance training program and periodical conferences.

This first purpose of good maintenance is to keep all plant elements in condition so that they may fulfill their intended functions during their life expectancies. Another purpose is to remove upon detection, any condition that may lead to an injury or accident to protect occupants or employees, and the third purpose is to forestall breakdowns by regular inspections and to repair or replace a plant element before it involves other adjacent elements in a breakdown.

A. CATEGORIES OF MAINTENANCE

Routine Maintenance

Non-Routine Maintenance

1. Routine Maintenance

Ordinary or recurring maintenance tasks performed by service requests from residents and management, or due to breakdowns to equipment, to the plant or to interior or exterior utilities; tasks that can be pre-scheduled, that can be planned ahead because they will be needed, or that can be predicted on the basis of equipment and property characteristics. We have classified routine maintenance in the following three types: 1 Janitorial and Grounds Maintenance, 2 Ordinary Plant-building Maintenance and 3 Preventative Maintenance.

a. Janitorial and Ground Maintenance

Routine tasks performed on a regular basis in order to maintain or upkeep the community and administration buildings and Project-maintained grounds and areas in a clean, safe and sanitary condition, and well groomed in appearance. Such items include up-keep by cleaning scrubbing, mopping, waxing, etc., of community-administration building and maintenance of lawns, roads, walks, trees, plants, fences, play areas, removal of debris, etc.

b. Ordinary Plant-Building Maintenance

Routine work, minor repairs and replacements, of keeping the buildings, equipment and distribution lines in such condition to utilize continually or to maximum period for

their intended purpose. Included are maintenance of roofs, attic spaces, windows, doors, floors, walls, ceilings, porches, foundations, utility lines, piping, air condition and heating equipment, plumbing equipment, plumbing repairs, pumps, tanks, ranges, refrigerators, incinerators, vehicles, tractors, mowers and all kinds of tools and equipment, etc.

c. Preventative Maintenance

(1) Preventative maintenance requires periodic inspections with a minimum of two inspections per year on each of the buildings, grounds, and equipment in each project (with the exception of the high-rise building mechanical rooms which require daily and constant inspections as shown in item (n) below) to take proper action to avoid or minimize costly repairs in the near future and to attempt to reduce costs and lessen major restorations and improvements. Preventative maintenance include but is not limited to the following things:

(a) Scheduled checking, adjusting, cleaning and lubricating of air conditioning, heating and other equipment such as tractors, mowers, power plants, welders, vehicles, etc.

(b) Periodic checking of ranges, hot water heaters, space heaters, and refrigerators for mechanical performance and for needed replacement of worn or broken parts.

(c) Inspecting, servicing, and replacing worn parts in all electrical equipment.

(d) Checking and repairing plumbing fixtures.

(e) Termite and vermin inspection and elimination.

(f) Periodic painting.

(g) Inspecting and patching of roofs, gutters, downspouts, and flashing.

(h) Inspecting underground facilities for corrosion and control thereof. This includes checking and correcting the cathodic protection system, and periodic checking of underground lines for leaks.

(i) Inspecting for condensation, dampness, and fungus in wood and for rust in iron components and taking appropriate corrective measures.

(j) Patching of project-maintained paved areas.

(k) Correcting erosion and drainage deficiencies.

(l) Fertilizing and cultivating planted areas.

(m) Installing protective barriers, where needed, for planted areas and trees.

(n) High-rise building mechanical rooms require daily and constant inspections of boilers, tanks, valves, pumps, pressure and temperature

gauges, etc. in order to provide utility services to the occupants and to ensure the safety of the building and occupants. The back-up power plant requires monthly inspections and testing.

(2) Annual Physical Inspections

An annual physical inspection of each apartment every building and all facilities will be conducted and may tie in with one of the scheduled preventative maintenance inspections at the same time.

(3) Fire Safety Inspections

In conjunction with the preventative maintenance and annual inspections, a fire safety inspection is to be conducted at the time of each of the scheduled inspections, on each apartment and every building and facilities two times each year, in order to detect and correct any fire hazards and to inspect fire extinguishers, smoke and heat detection devices, fire alarms, and other fire fighting equipment or system to ensure operation at all time.

High-rise occupants will be requested to participate in a fire drill once each year. Special care and precautions will be taken with the feeble elderly and those on wheel chair.

A follow-up procedure form shall be utilized to ensure that all required repairs, replacements or things found in the Preventative Maintenance, Annual, or Fire Safety inspections, have been carried out within a reasonable length of time.

2. Non-routine Maintenance

Non-routine maintenance shall include extraordinary maintenance, replacements of equipment, betterments and additions. When major repairs and rehabilitation, replacement of equipment and additions involving substantial expenditures are needed for relatively long intervals of time, or when such repairs, replacements or additions are required due to occurrences such as hurricane, flood, fire, obsolescence, by steady adverse weather conditions or caused by underground corrosion or buildup in utility lines, all such work items may be undertaken either by contract or force account. The items required are to be undertaken on a priority basis and depending on the availability of funds, subject to HUD approval.

JOB DESCRIPTION

EXECUTIVE DIRECTOR

DUTIES AND RESPONSIBILITIES (include, but not limited to):

1. To be primary advisor to the Board of Commissioners and serve as Secretary at all Board Meetings;
2. To manage and direct all functions of the Housing Authority;
3. To administer directives and policies of the Board of Commissioners;
4. To recruit, hire, direct and coordinate the work of Supervisors and other employees;
5. To administer sound safety practices;
6. To carry out a public relations program;
7. To handle all fiscal functions for the Board of Commissioners and the Authority;
8. To ensure compliance with all HUD guides, policies, manuals, notices, and circulars;
9. To develop and administer an operating and management plan;
10. To sign all financial reports, checks, vouchers, purchase orders, contracts, and other official correspondence submitted to the Board, HUD, or other appropriate agencies;
11. To direct procurement and property control according to established policies;
12. To administer the Authority Personnel Policy and recommend changes and updates as required;
13. To administer all tenant related affairs in accordance with State Law, HUD directives and local policy;

14. To plan and develop housing construction and maintenance programs;

15. To act as Contracting Officer in the development or modernization of housing units;

16. To direct and administer all of the Section 8 Housing Assistance Payment Programs undertaken by the Authority;

17. To develop and administer a Social Services Program.

MINIMUM QUALIFICATIONS:

Training and Experience: Graduation from a recognized college or university with Bachelors Degree in Business Administration, Social Science or Engineering field, or five years of progressive responsible experience in housing management, construction or maintenance or an equivalent combination of training and experience.

Knowledge, Abilities and Skills: Comprehensive knowledge of methods and techniques of assisted housing management, construction and maintenance, and comprehensive knowledge of the laws and regulations of the Federal, State and City entities governing the management development, administration and operation of the assisted housing programs.

Ability to express himself/herself clearly and concisely, orally and in writing; ability to establish and maintain effective working relationship with others; ability to plan, assign and coordinate the activities of subordinates. Ability to also understand and communicate in Spanish preferred.

Possession of valid Texas Driver's License required. Driver must also be certified as an eligible driver by the Housing Authority's Insurance Carrier as meeting the Insurance Carrier's requirements and other criteria in order for the driver to be able to drive the Housing Authority's vehicles.

NOTE: In accord with State Responsibility Law, if licensed driver drives a personal vehicle, he/she must carry valid Liability Insurance. In order to keep license valid at all times and avoid possibility of losing license, this insurance requirement must be met.

MAINTENANCE SUPERINTENDENT

DUTIES AND RESPONSIBILITIES:

1. Under supervision of the Executive Director, to exercise over-all supervision of maintenance of all of the Housing Authority facilities, including building fixtures, grounds, underground utility lines, overhead utility lines, automotive equipment, storage areas, etc. . . . and performs related work as required.
2. To assign, schedule and supervise the work of all maintenance personnel.
3. To review the maintenance requirements at all projects and advise the Executive Director on maintenance matters.
4. To provide instruction and advise on all maintenance matters to operating personnel and conduct training where necessary.
5. To make estimates of time and materials required for various tasks and help review and determine short and long-range maintenance costs for budgetary purposes.

6. To supervise the maintenance of work records and prepare reports as required.
7. To make annual and periodic inventory of maintenance supplies and equipment.
8. To perform or supervise the annual or vacated units inspections and follow with necessary repairs, replacements or preventative maintenance requirements.
9. To assess charges to tenants for labor and materials on certain items require reimbursement of costs.
10. To assist Executive Director and Project Managers by periodically checking dwelling units, all ground areas and trees to determine if these are kept by tenants in accordance with their leases and project rules.
11. To prepare written requests to the Central Office, clearly printed (or type written, if possible) showing quantity, items, and costs per item for purchase of supplies and equipment in accordance with the procurement policy.
12. To keep records of repairs and gasoline and oil consumption of all Housing Authority vehicles and motor equipment.
13. To supervise the monthly reading of utility meters for assessment of excess utilities and for the purpose of the establishment of future utility allowances.
14. To assist the Executive Director or his delegated assistant in any other maintenance matter which may become necessary from time to time.

MINIMUM QUALIFICATIONS:

Training and Experience: Graduation from high school and eight years of progressive responsible experience in the

construction field and building maintenance or an equivalent combination of training and experience. Participation in management and maintenance courses.

Knowledge, Abilities and Skills: Considerable knowledge of the methods, materials, tools, and equipment used in the maintenance of apartments; good working knowledge of general facilities and maintenance operations, including budgeting and finances.

Ability to plan, organize, and administer an over-all maintenance program; ability to read and interpret blue prints, plans and specifications; ability to establish and maintain effective working relationships with employees, officials, suppliers and the general public; ability to maintain adequate records and prepare reports. Ability to understand and communicate in Spanish and English.

Possession of a valid Texas Driver's License required. Driver must also be certified as an eligible driver by the Housing Authority's Insurance Carrier as meeting the Insurance Carrier's requirements and other criteria in order for the driver to be able to drive the Housing Authority's vehicles.

NOTE: In accord with State Responsibility Law, if licensed driver drives a personal vehicle, he/she must carry valid Liability Insurance. In order to keep license valid at all times and avoid possibility of losing license, this insurance requirement must be met.

[LOGO]

U.S Department of Housing and
Urban Development
San Antonio Office, Region VI
Washington Square
800 Dolorosa
Post Office Box 9163
San Antonio, Texas 78285

NOV 10 1983

Mr. Raul L. Trevino
Executive Director, Housing Authority of the
City of Brownsville
P.O. Box 4420
Brownsville, TX 78520

Dear Mr. Trevino:

The Maintenance Plan recently submitted has been reviewed and is acceptable. This fulfills the requirement in work item number a-83-2 in the 1983 CIAP Budget and should be implemented immediately.

If you have any questions, please contract Mr. Alton Foote at Area Code 512/229-6879 or Mr. Bruce Gill at 229-6874.

Sincerely,

/s/ John T. Suskie
John T. Suskie
Acting Manager, 6.85

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

JOSE GRACIA, ET AL, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. B-91-146
BROWNSVILLE HOUSING AUTHORITY, ET AL, Defendant.	§	

ORDER

(Filed Aug. 18, 1993)

Before the Court are the following motions: Brownsville Housing Authority's motions to dismiss for failure to state a claim, for summary judgment as to Section 1983 claims, for summary judgment as to the defense of sovereign immunity, for judicial notice of limited liability; Intervenor Healthsouth Rehabilitation Center's motion to file amended intervention; Plaintiff's motions to strike insufficient defenses pursuant to F.R.C.P. 12 (f), to strike experts, to take judicial notice, and responses thereto.

FACTS

The circumstances of this case are evidenced by pleadings, discovery and affidavits on file with the Court. On July 24, 1988 the plaintiffs, minor children and parents of deceased child were visiting relatives at Brownsville Housing Authority property located at 1817 Lincoln

street Brownsville Texas. While at the property the children were sitting in a hammock secured to two trees. One of the trees, a large allegedly dead avocado tree, collapsed and fell on the children causing the death of one child, Jose Angel Gracia, III and rendering a second child, Monica Gracia, a ventilator dependent quadriplegic.

The plaintiffs brought suit against the defendants maintaining that their constitutional rights were violated in the taking of their life and liberty by the defendants' "systematic and deliberate failure to follow mandatory Federal statutes, laws, regulations, and codes" and alleging various state causes of actions.

MOTIONS

Brownsville Housing Authority's (B.H.A.) motions can be divided into two sections, those concerning alleged federal causes of action and those concerning state causes of action. The Court will discuss the federal issues first.

The Defendants maintain that the Plaintiffs have failed to state a claim under 42 U.S.C. § 1983, and in the alternative should one be stated, a summary judgment is proper in that thee are insufficient allegations concerning the presence of a custom or policy which resulted in the deprivations of rights, and that there is no evidence of deliberate indifference of a constitutional right.

Section 1983 provides a federal remedy for "the deprivation of any rights, privileges or immunities secured by the constitution and laws." 42 U.S.C. § 1983. The Supreme Court has recognized that when there is a

governmental deprivation of a right secured by a federal statute Section 1983 provides a remedial cause of action, unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose private enforcement, or the statute does not rise to the level of an enforceable right. *Golden State Transit Corporation v. City of Los Angels* [sic], 110 S.Ct. 444 (1989), citing, *Penhurst State School and Hospital v. Halderman*, 450 U.S. 1, 101 S.Ct. 1531 (1981); *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457 (1984). The Supreme Court has set forth a frame work for analyzing whether a federal statute creates an enforceable right within the meaning of Section 1983. *See, Wilder v. Virginia Hospital Association*, 496 U.S. 498, 509, 110 S.Ct. 2510, 2517 (1990). First the Court must consider if the provision or provisions in question were intended to "benefit the putative plaintiff". *Id.* If the answer is yes, then there is an enforceable right unless one of two exceptions apply. First, the court must consider whether the statute reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation, and second whether the interest the plaintiff asserts is too vague, such that it is beyond the competence of the judiciary to enforce. *Wright v City of Roanoke Redevelopment and Housing Authority*, 107 S.Ct. 766 (1987); *Penhurst State School and Hospital.*

In *Wright* the Supreme Court recognized a Section 1983 cause of action against a housing authority stemming from an amendment to the Housing Act of 1937. In doing so the Court found that remedial devices in the Housing Act, which do not contain a provision for a

private judicial remedy, were not such that they demonstrated a Congressional intent to foreclose a private Section 1983 remedy. *Wright* at 771-772. The Supreme Court, in holding for the private remedy necessarily found that the interest asserted by the plaintiff was within the competence of the judiciary to enforce. *See, Id.*

In the case at hand, the Plaintiffs maintain that they have a cause of action pursuant to Section 1983 for deprivation of rights secured by federal statutes. In their petition the plaintiffs have alleged violations of federal statutory rights secured under federal statutes, laws, regulations, and codes demonstrated by the annual contribution contract with H.U.D., the federally mandated dwelling lease, and specific provisions of state and city laws as well as rules and regulations of the B.H.A. that have been incorporated by federal law. Specifically the plaintiffs cite in their petition:

> The Code of Federal regulations, 24 CFR § 966.4(d),(e)(1)(2)(3)(4), f(4)(5)(6)(7), (g); § 966.6(c); § 968.101(a); § 968.105; § 968.115(a)(b); § 968.201; § 968.203; § 968.205; § 968.215 (a)(b)(c); § 968.240(a); § 968.251 (1988 & 1990)
>
> HUD, Consolidated Annual Contributions Contract, Part I, HUD form no. 53010, § 5, 7, 13, 14(d)(2) (Nov. 1969).
>
> HUD, Consolidated Annual Contributions Contract, Part II, HUD form no. 53011, art. I, §§ 101, 102; art. II, § 201, 203,209; art. III, § 305, 307 (Nov. 1969).
>
> HUD, Public and Indian Comprehensive Improvement Assistance Program Handbook,

7485.1 rev-4 (Dec. 1989), ch. 1, para 1-1, 1-2,1-3a, 1-3b, 1-3d, 1-3q, 1-3r,1-3t, 1-3x, 1-4a; Ch. 2 para 2-3b(3)(f), 2-3b(5).

HUD, Public Housing Modernization Standards Handbook, 7485.2 rev-1 (Feb. 1985), ch. 1, para 1-1, 1-2,1-3; Ch. 3, para 3-1, 3-5, 3-8, 3-10; Ch. 10, para 10-3, 10-3(a), 10-3d.

Standard Hous. Code § 101.6; 103,2,1; 104; 202; 307.1; 307.4 (Southern Building Code Congress International, Inc. 1985 & 1988 editions).

Standard Bldg. Code § 101.6 (Southern Building code Congress International, Inc. 1982 & 1985 editions).

Housing Auth. of Brownsville, Tex. Dwelling Lease, sec. 9A para 1-4 (Jan. 1972 amended April 1, 1985).

Brownsville, Tex. Hous. Code ch. 17, art. I, § 17.1(a),(b); art. II § 17-16, 17-18 (1974, 1978, 1985).

Brownsville Tex. Landscape Code ch. 26, art. IX, § 401, 403 (2)(3) (1987); (Ord. No. 897, § 1, 5-4-78; Ord. No. 87- 1100.05, § 5, 7-7-87.

Brownsville, Tex., Bldg. Code ch. 9, art. II §§ 9-3, 9-15 (1985) (including ordinance no. 723-c, 9-10-85).

Housing Auth. of Brownsville, Tex., By-laws, art. II, § 4, 5 & 8.

Housing Auth. of Brownsville, Tex., Manual of Operations, Part Vii, Statement of Personal Policies Sections: 1(f), 2(a)(b), 5(a)(1)(2), 6(b), 7(b)(6)(16), 12, 21.

Housing Auth. of Brownsville, Tex., Manual of Operations, Supplement to Part VIII, Maintenance Plan A1 a, A1c(1)(e)(i)(l)(m), B6, B.7.

Housing Auth. of Brownsville, Tex., Manual of Operations, Part VII, § 20, Exhibit No. 1 Job Description for Executive Director, No.s, 2, 3, 4, 5, 8, 9, 12, 13, 14; Job Description for Maintenance Superintendent, No.s 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14; Job Description for project managers, No.s 6, 7, 8, 12.

Tex. Loc. Gov't. Code Ann. § 392.031(a), 392.038, 392.041(a), 392.051(b)(c), 392.052(g)(f)(3), 392.062(a)(b) (Vernon 1987 & Supp. 1989); § 392.004, 392.006 (Vernon Supp. 1993).

Upon consideration of the aforementioned statutes, code provisions, regulations, and federally mandated contract provisions the Court is persuaded the plaintiffs have at the least stated a claim pursuant to Section 1983. In analyzing the applicable laws it is the opinion of the Court that the provisions in question were intended by Congress to benefit the "putative plaintiff" in this case. Further, the mandatory nature of the maintenance plans and required inspections, combined with the fact these plans were implemented in order to receive government contributions leaves the Court with no other conclusion but that these were binding obligations. Likewise, the Court is inclined to agree with the Supreme Court's determination in *Wright*, that when considering the Housing Act and related statutes and regulations there is absent a Congressional intent to foreclose private remedies pursuant to Section 1983 and that the Judiciary is indeed competent to enforce them. Therefore the

Defendants' Motion to dismiss for failure to state a claim is hereby DENIED.

In the alternative the Defendants have asserted that a summary judgment is proper on the federal Section 1983 causes of action. A summary judgment is only proper when no issue of material fact exists and the movant is entitled to a judgment as a matter of law. F.R.C.P. 56; *Mississippi Poultry Ass'n, Inc. v. Madigan* 992 F.2d 1359, 1362 (5th Cir. 1993). The standard applied is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one sided that one side must prevail as a matter of law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 251-252 (1986).

The Defendants properly assert that in order to maintain a cause of action under Section 1983 against a municipality or agency thereof, the Plaintiff must allege and assert a custom and policy that resulted in the deprivations alleged. *Pembaur v. Cincinnati*, 475 U.S. 469, 480, 106 S.Ct. 1292, 1298 (1986). Similarly, the Defendants properly assert that an allegation of mere negligence will not support a Section 1983 claim as a matter of law. *City of Kentucky v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989); *Mouille v. The City of Live Oak, Texas*, 977 F.2d 924 (5th Cir. 1992). Rather, the Plaintiff must allege more than mere negligence, a conscious indifference to the enforceable right asserted by the Plaintiff. *See, Mouille.*

Even though these propositions of law are accurate, the Court is not of the opinion that a summary judgment is proper in this case. Upon consideration of the summary judgment evidence, consisting of pleadings, discovery,

and affidavits on file in this case, the Court has determined that a custom or policy concerning the actions or rather the lack of action on the art of the Defendants is at the least plead by the Plaintiffs such that there is a material issue of fact in existence. The Plaintiffs allege and demonstrate through discovery sufficient issues concerning their allegations that it was the Defendants' custom and policy to systematically and deliberately fail to follow mandatory Federal statutes, laws, regulations, and codes such that there is sufficient disagreement to submit them to a jury.

The Court is equally persuaded that there is sufficient evidence concerning deliberate indifference as to constitute a material issue of fact. Therefore, it is the opinion of the Court that the issues presented in the Defendants' Motions for Summary Judgments are not so one sided as to prevail as a matter of law, and accordingly they are hereby DENIED.

The issues concerning federal questions having been determined the state issues remain. The defendant B.H.A. maintains that it is a governmental unit of the state, and as such is entitled to governmental immunity and it's [sic] liability, if any at all, is therefore limited by the Texas Tort Claim Act. In that connection B.H.A. requests the Court to take judicial notice pursuant to Federal Rules of Evidence 201 of their asserted limited liability. The Plaintiffs maintain that Brownsville Housing Authority is a political subdivision of the City of Brownsville and as such is not entitled to sovereign immunity for its proprietary acts. In other words they maintain B.H.A. is a municipal unit and because its acts were proprietary, and

not listed as excepted, they fall outside of the Texas Tort Claims Act.

The Defendants initially relied on Tex. Loc. Gov't Code Ann. § 392.006 delineating housing authorities as units of state government and defining their actions as governmental rather than proprietary, however this statute was not in effect at the time the Plaintiffs' actions accrued. *See* V.A.T.S. *Local Government Code* § 392.006 (effective August 28, 1989). The Defendants now assert that prior to § 392.006 housing authorities were considered units of state government whose actions were governmental, and that the 1989 statute was merely a codification of existing law.

In support of this proposition the Defendants assert that B.H.A. cannot be an agency of the municipality because the city of Brownsville does not maintain any control over B.H.A., which is a necessary element of any agency. Additionally the Defendants maintain that this is an issue of first impression.

The Defendants are correct in asserting that case law in this area is limited, however this is not a case of first impression. Texas Courts have held that housing authorities are divisions of the municipality and that they exist only with the consent of the municipality. *See, Meirs v. Housing Authority of City of Dallas,* 266 S.W.2d 487, 490 (Tex. Civ. App. – Dallas, 1954) (266 S.W.2d 842 (Tex. 1954 – answers to certified questions); *Aetna Casualty and Surity Co. v. Glidden Company,* 283 S.W.2d 440, 441 (Tex. Civ. App. – Eastland, 1955, *Rev'd on other grounds*), 291 S.W.2d 315 (Tex. 1956). The city of Brownsville does in fact maintain some control over the B.H.A. as evidenced by

Tex. Loc. Gov't Code Ann. § 392.011 (Vernon 1988) (Power to create housing authority); Tex. Loc. Gov't Code Ann. § 392.031 (Vernon 1988) (Power to appoint housing commissioners); Tex. Loc. Gov't Code Ann. § 392.037 (Vernon 1988) (Power to designate housing commission chairman); Tex. Loc. Gov't Code Ann. § 392,041 (Vernon 1988) (Power to remove commissioners). Moreover, section 101.001 of Vernons Civil Practice and Remedy Code (effective 1987), while specifically naming political subdivisions falling under its purview, does not list housing authorities as units of state government. In fact, the Texas Legislature in 1989 specifically enacted Loc. Gov't. Code § 392.006, naming housing authorities as units of state government whose functions were governmental in nature, to remedy the situation. For these reasons it is the opinion of the Court that prior to the enactment of Loc. Gov. Code § 392.006 B.H.A. was a political subdivision of the City of Brownsville and therefore the next inquiry involves its functions.

Texas Civil Practice and Remedies Code § 101.0215 (effective Sept. 1987) (Texas Tort Claim Act) mandates that municipalities have limited liability for their governmental functions and recognizes the continuing existence of the prior rule excluding from sovereign immunity proprietary functions. Tex. Civ. Prac. and Rem. Code Ann. § 101.0215. In general, § 101.0215 lists those functions that are governmental or that at one time were considered to be proprietary but are now codified as governmental. *See, Id.* When a court is making a determination concerning a municipal function merely checking the laundry list of governmental functions is not sufficient, further analysis under the act is required to

determine potential liability. *See, McKinney v. City of Gainesville,* 814 S.W.2d 862 (Tex. App. 2nd Dist. 1991); *Alon v. City of DeSoto,* 852 S.W.2d 530, (Tex. App. – Dallas, 1992). Notwithstanding, it is important to note that housing is not listed under § 101.0215 as a governmental function and the Texas legislature felt is necessary to classify or reclassify it as a governmental function in 1989. *See,* V.A.T.S. *Local government Code* § 392.006 (effective August 28, 1989).

In differentiating between government and proprietary functions under the language of the statute Texas courts ask if the functions are undertaken for the benefit of private enterprise or a resident of the municipality or are they undertaken for the interest of the general public. *See, City of Houston v. Southwest Concrete Construction Inc.,* 835 S.W.2d 728 (Tex. App. – Houston [14th district] 1992); V.A.T.S. *Local government Code* § 392.006 (effective August 28, 1989). In applying the aforementioned principals it is the opinion of the Court that prior to 1989 the functions of the B.H.A., i.e. housing, were proprietary in nature in the they were discretionary and undertaken for specific residents. Therefore the Defendants' motion for summary judgment on sovereign immunity is hereby Denied.

The Court does recognize that Tex. Loc. Gov't Code Ann. § 392.103 was in effect prior to the events in this case and accordingly grants the Defendants' Motion to take judicial notice pursuant to Federal Rules of Evidence 201 as to § 392.103.

In regard to Healthsouth Rehabilitation Center's motion to file third amended complaint in intervention the Court acknowledges and recognizes their right to

intervene. The Court further reserves its determinations to any objections concerning the character of the intervention and the type of lien asserted until such time as the Court chooses to make a determination.

The remaining motions on file are the Plaintiffs' motions to strike insufficient defenses, motion to strike Defendants' experts and motion to take judicial notice. The Court reserves its decision concerning the plaintiffs' proposed judicial notice until formal pretrial. The Plaintiffs' motion to strike defenses is brought pursuant to F.R.C.P. 12(f). Specifically, the Plaintiffs attack the defenses of sovereign immunity and limited liability asserting that B.H.A.'s contributions contract Housing and Urban Development and its liability insurance contract prohibit B.H.A. from asserting those defenses. A plain reading of the provisions in the contribution contract demonstrates that the referenced areas define B.H.A.'s insurance requirements and that the insurance contract provisions cited concern coverage issues between the insured and insurer. The Plaintiffs contentions in these matters are misplaced. Notwithstanding, the Court is of the Opinion that the matters concerning these defenses have been resolved infra in this order, to the extent that these matters are asserted pursuant to 12 (f) the Court Denies the Plaintiffs motion to strike defenses.

The last motion concerns a discovery issue. The Plaintiffs move to strike Defendants' experts. Inasmuch as these experts apprear to have been noticed timely this motion will be denied. However, the Plaintiffs shall be allowed to depose the Defendants' experts and designate rebuttal experts who may in turn be deposed by the

Defendants. The deadline for this extension shall be September 15, 1993 and shall not exceed the scope designated above.

CONCLUSION

In summary, the defendant Brownsville Housing Authority's motions to dismiss for failure to state a claim, for summary judgment as to Section 1983 claims, for summary judgment as to the defense of sovereign immunity, for judicial notice of limited liability are hereby DENIED. The Court does take judicial notice of Tex. Loc. Gov't. Code Ann. § 392.103. Healthsouth Rehabilitation Center's intervention is recognized and determination as to the character of the lien is reserved. The Plaintiff's motions to strike insufficient defenses pursuant to F.R.C.P. 12 (f) is DENIED to the extent that it is brought pursuant to F.R.C.P. 12 (f) and premised on the allegations in the Plaintiffs' motion. Lastly Plaintiffs' motion to strike experts is DENIED and Discovery shall proceed as outlined herein above.

DONE at Brownsville, Texas this 18th day of August, 1993.

/s/ Filemon B. Vela
Filemon B. Vela
United States
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

JOSE GRACIA AND	§	
MARY GRACIA, ET AL	§	CIVIL ACTION
VS.	§	NO. B91-146 JURY
	§	
BROWNSVILLE HOUSING	§	(Filed Mar. 18, 1994)
AUTHORITY, ET AL	§	

PLAINTIFFS' SUPPLEMENTAL OBJECTION
TO THE COURT'S MAIN CHARGE TO THE JURY

COME NOW Plaintiffs by and through their attorneys of record and respectfully move the Court to reconsider the denial of the submission of the negligence issue in the Court's main charge and would show the Court as follows:

On the occasion of this tragedy, the Plaintiffs were guests of their grandfather Esequiel Gracia, a lessee of the Brownsville Housing Authority. In *Parker v. Highland Park, Inc.* 565 SW2d 312, 514-15, (Tex. 1978) (attached hereto), the Texas Supreme Court held that the Plaintiff, Mrs. Parker, was a dinner guest of Judge and Mrs. Massey at their apartment. Mrs. Parker fell down the darkened stairs at the apartment and was injured. The Texas Supreme Court held that the landlord owed the same duty to Mrs. Parker, as a guest of its tenants, Judge and Mrs. Massey, that it owed to the tenants themselves. 565 SW2d at 515. *Parker* is on all fours with this motion, except for the Brownsville Housing Authority being a governmental entity. However, the Brownsville Housing Authority is not able to avail itself of the elevated duty

afforded by § 101.022 Tex. Civ. Prac. & Rem. Code because the Brownsville Housing Authority is *not* protected by the Texas Tort Claims Act § 101.001, et seq. Tex. Civ. Prac & Rem. Code. The District Court determined that the Brownsville Housing Authority is acting in a proprietary capacity. In *Kerrville HRH v. City of Kerrville* 805 SW2d 377 (Tex. App.-San Antonio 1990, writ denied) the Court held that when a city, that could ordinarily avail itself of the protection of the Tort Claims Act, was sued in a proprietary function (under the Texas Deceptive Trade Practices Act) the Tort Claims Act did not apply.

> Because this suit does not involve a tort claim, the Act is inapplicable. . . . 803 SW2d at 381.

See also *Houston v. Southwest Concrete Const.* 835 SW2d 728 (Tex. App. Houston (14th Dist.) 1992, writ den'd) The statute *clearly* prohibits the application of § 101.003 to actions "arising from (its) proprietary function . . . " Tex. Civ. Prac. & Rem Code § 101.0215. (attached hereto)

Furthermore, the Tort Claims Act does not apply to the individual Defendants in their tort actions. *City of Bedford v. Schattman* 776 SW2d 812 (Tex. App. - Ft. Worth, 1989, no writ) (attached hereto). Thus, *Parker* (cited by the Texas Supreme court in its most recent premises liability decision, *Keetch v. Kroger Co.* 845 SW2d 262 (Tex. 1992)) applies to the Brownsville Housing Authority, also operating in a proprietary function.

Plaintiffs move the Court to grant this objection to the Court's Main Charge and submit an ordinary negligence charge to the jury as requested by the Plaintiffs.

Respectfully submitted,

/s/ Dwain Dent
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THE DENT LAW FIRM
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/s/ Art Brender
ART BRENDER
LAW OFFICE OF
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

JOSE AND MARY GRACIA, HUSBAND AND WIFE, INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF JSOE [sic] ANGEL GRACIA, III, A DECEASED CHILD, AND AS NEXT FRIENDS OF MONICA GRACIA, ADAM GRACIA, AND CHRISTOPHER GRACIA, MINOR CHILDREN	§	CIVIL ACTION NO. B-91-146
VS	§	(Filed Mar. 21, 1994)
BROWNSVILLE HOUSING AUTHORITY, RAUL TREVINO, INDIVIDUALLY AND AS EXECUTIVE DIRECTOR OF THE BROWNSVILLE HOUSING AUTHORITY, GENOVEVO RUBALCABA, INDIVIDUALLY AND AS SUPERVISOR OF MAINTENANCE OF THE BROWNSVILLE HOUSING AUTHORITY	§	

PLAINTIFFS' STATE CLAIMS

(Question No. 1 & 2)

In this action the Plaintiffs claim that as guests of a relative who resided at the Brownsville Housing Authority's property, Jose Angel Gracia, III was killed

and his sister Monica Gracia injured when a tree located on the premises of the Housing Authority collapsed and struck the children. The Plaintiffs claim that the Defendants failed to use ordinary care in maintaining the premises, failed to use ordinary care to inspect the premises, and that this failure constituted negligence and was a proximate cause of the injuries in question.

The defendants deny that any of their actions during the time in question constituted negligence and that their actions were a proximate cause of the injuries in question. You are instructed that:

"ORDINARY CARE" means that degree of care which would be used by a person of ordinary prudence under the same or similar circumstances.

"NEGLIGENCE" means failure to use ordinary care; that is to say failure to do that which a person of ordinary prudence would have done under the same or similar circumstances, or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

"PROXIMATE CAUSE" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause.

PLAINTIFFS' FEDERAL CLAIMS

The Plaintiffs also claim that their rights under Federal law were violated because the Defendant's failed to train and supervise Housing Authority personnel to inspect and maintain the premises pursuant to federal regulations. The Plaintiffs further contend that the Housing Authority had official policies requiring the premises be inspected yearly and maintained in a safe condition and that violation of this policy is a violation of federal constitutional and statutory rights.

The defendants deny that any of their actions during the time in question violated constitutional and statutory rights of the plaintiffs.

Section 1983 of Title 42 of the United States Code provides that any person may seek redress in this Court by way of damages against any person who under color of state law or custom, intentionally deprives that citizen of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

The constitutional and statutory rights that the Plaintiffs claim the defendants violated are:

1. The right not to be deprived of life or liberty without due process of law;

2. The right not to be denied the federal statutory rights secured under the annual contributions contract, the dwelling lease, under specific provisions of state and city law as well as rules and regulations of the Housing Authority of Brownsville that have been incorporated by Federal law.

In order to prove their claims under this statute, the plaintiffs must establish by a preponderance of the evidence each of the following elements:

1. That the Defendants intentionally or with conscious indifference committed acts that violated one or more of the Plaintiff's federal constitutional and/or statutory rights;

2. That in doing so the Defendants acted "under the color of state law"; and

3. That the Defendants acts were the legal cause of the Plaintiff's damages.

In this case you are instructed that the Defendants were acting under color of state law at the time of the acts complained of.

Failure to Inspect/Failure to Train

(Question 3 & 4)

The Defendants may be liable for deprivations of Monica Gracia and Jose Angel Gracia III's constitutional and statutory rights for its failure to inspect and safely maintain its premises. You are instructed that the Defendants are required to follow federal and local laws incorporated by federal law regarding the maintenance and inspection of the housing authority premises. The failure to inspect and safely maintain the housing authority premises may serve as a basis for liability only where the failure in a relevant respect amounts to conscious indifference to the rights of those persons using the premises. The identified deficiency in maintenance and/or inspection must be closely related to the ultimate injury.

The Defendants may be liable for deprivation of Plaintiffs' constitutional or statutory rights for its failure to adequately train and supervise its employees. Such failure to train and supervise can result in liability for the housing authority even if the housing authority's underlying policy, for which training or supervision is required, is constitutional or complies with federal regulations. In other words, if a valid policy is ignored or violated by a housing authority employee, the housing authority is liable if the employee had not been adequately trained or supervised and the constitutional or statutory deprivations have been caused by the failure to train. Provided that the failure to train was a custom or policy, and the failure to train in relevant respect amounts to a conscious indifference to the constitutional or statutory rights of persons with whom the employees came in contact.

Custom or Policy

(Question No. 5 & 6)

Plaintiffs claim that the Brownsville Housing Authority is liable for alleged constitutional and statutory deprivations. The Brownsville Housing Authority is liable for the deprivation of a constitutional or statutory right if the deprivation was pursuant to governmental policy, custom, ordinance, regulation or decision. Therefore, if you find that Monica Gracia and Jose Angel Gracia were injured as a proximate or legal result of the Brownsville Housing Authority's policy, custom, ordinance, regulation or decision, whether made by its lawmakers or by those officials whose edicts or acts may be fairly said to

represent official policy, the authority itself will be responsible.

A custom of the housing authority or governmental entity is established when the officials or employees of the housing authority engage in persistent, wide spread practice that is so common and well settled that it fairly represents a policy.

The governing body of the housing authority must have actual or constructive knowledge of the custom. Constructive knowledge of the custom occurs when a governing body has both the power and intention, at a given time, to exercise dominion and control over the particular practice or custom, whether they actually exercise that dominion and control or not.

DEFENDANTS' STATE CLAIMS

(Questions 7 & 8)

The Defendants contend that Jose and Mary Gracia Jr. were negligent, and that such negligence was a proximate cause of the injuries in question.

You are instructed to refer to the definitions of ordinary care, negligence, and proximate cause you were favored with under the title "Plaintiffs' State Claims".

You are further instructed that the burden of proof for questions 7 & 8, and only 7 & 8, rests upon the Defendants.

DAMAGES

(Questions 10 A, B, C, D, E)

Disfigurement/loss of capacity for enjoyment of life

You may award damages for any bodily injury that the Plaintiffs sustained and any pain and suffering, disability, disfigurement, mental anguish and/or loss of capacity for enjoyment of life that the plaintiffs experienced in the past or will experience in the future as a result of the bodily injury. No evidence of the value of intangible things, such as mental or physical pain and suffering, has been or need be introduced. You are not trying to determine value, but an amount that will fairly compensate the Plaintiffs for the damages they have suffered. There is no exact standard for fixing the compensation to be awarded for these elements of damages. Any award that you make should be fair in the light of the evidence.

Compensatory Damages

If you find that the Defendant is liable to the Plaintiff then you must determine an amount that is fair compensation for all of the Plaintiffs' damages. These damages are called compensatory damages. The purpose of compensatory damages is to make the Plaintiffs whole – that is, to compensate the Plaintiffs for the damage that Plaintiffs have suffered. Compensatory damages are not limited to expenses that the Plaintiffs may have incurred because of their injuries.

You may award compensatory damages only for injuries that the Plaintiffs prove were proximately caused by the Defendants' allegedly wrongful conduct. The damages that you award must be fair compensation for all of the Plaintiffs' damages, no more and no less. Damages are not allowed as a punishment and cannot be imposed or increased to penalize the Defendants. You should not award compensatory damages for speculative injuries, but only for those injuries which the Plaintiffs have actually suffered or that the Plaintiffs are reasonably likely to suffer in the future.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that the Plaintiffs prove the amount of their losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

Calculation of Past and Future Damages

A. Damages Accrued.

If you find for the Plaintiffs, they are entitled to recover an amount that will fairly compensate them for any damages they have suffered to date.

B. Calculation of Future Damages.

If you find that the Plaintiffs are reasonably certain to suffer damages in the future from these injuries, then you should award them the amount you believe would fairly compensate them for such future damages. In calculating future damages, you should consider the standard table of mortality as compiled by the United States Bureau of the Census, or other recognized mortality table.

C. Reduction of future Damages to Present Value.

An award of future damages necessarily requires that payment be made now for a loss that the Plaintiffs will not actually suffer until some future date. If you should find that the Plaintiffs are entitled to future damages, including future earnings, then you must determine the present worth in dollars of such future damages.

If you award damages for loss of future earnings, you must consider two particular factors.

1. You should reduce any award by the amount of the expenses that the Plaintiffs would have incurred in making those earnings.

2. If you make an award for future loss of earnings, you must reduce it to present value by considering the interest that the Plaintiffs could earn on the amount of the award if he made a relatively risk-free investment. The reason why you must make this reduction is because an award of an amount representing future loss of earnings is more valuable to the Plaintiffs if they receive them today than if they received it in the future, when they would otherwise have earned it. It is more valuable because the Plaintiffs can earn interest on it for the period of time between the date of the money. Thus you should adjust the amount of any award for future loss of earnings

by the amount of interest that the Plaintiffs can earn on that amount in the future.

If you should make any award for future medical expenses, you should adjust or discount the award to present value in the same manner as with loss of future earnings.

However, you must not make any adjustment to present value for any damages you may award for future pain and suffering or future mental anguish.

QUESTION NO. 1

Do you find from a preponderance of the evidence that any of the named Defendants were negligent?

You are instructed that any of the individuals named were negligent if:

A). The tree posed an unreasonable risk of harm; and

B). The Defendants knew of the danger; and

C). The Defendant failed to exercise ordinary care to eliminate the danger.

Answer "Yes" or "No".

ANSWER: NO

If you have answered QUESTION NO. 1 "Yes", then answer QUESTION NO. 2; otherwise, do not answer any further questions.

QUESTION NO. 2

Do you find from a preponderance of the evidence that the negligence of the Defendants proximately caused the injuries in question?

Answer "Yes" or "No".

ANSWER: _____

If you have answered QUESTION NO. 2 "Yes", then answer QUESTION NO. 3; otherwise, do not answer any further questions.

QUESTION 10E

What sum of money, if paid now in cash, would fairly and reasonably compensate Adam Gracia and/or Christopher Gracia for mental anguish from witnessing the occurrence in question and the subsequent injuries to Monica Gracia and the death of Jose angel Gracia, III and for the loss of consortium with Monica Gracia.

The loss of consortium means:

Any loss of the right to the affection, solace, comfort, companionship, society, emotional support, love, felicity between a child and a sibling sustained in the past and which the sibling will sustain in the future.

Answer in dollars and cents for damages, if any, that were sustained in the past and that in reasonable probability will be sustained in the future.

Adam Gracia Answer: _____

Christopher Gracia Answer: _____

This Is A True Verdict.

Date 3-21-94 /s/ Dan McCruz
Foreperson

Supreme Court, U.S.
FILED
AUG 21 1997
CLERK

No. 97-150

In The

Supreme Court of the United States

October Term, 1996

JOSE GRACIA, ET AL.,

Petitioners,

v.

RAUL TREVINO, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTIONS PRESENTED

1. Does 24 C.F.R. § 966.4 create a right in favor of social guests of public housing tenants that the premises be kept safe, which right is enforceable under 42 U.S.C. § 1983?

2. Does the question of whether the District Court correctly defined and submitted the state tort claim against Brownsville Housing Authority present a question that this Court should review?

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FACTUAL BACKGROUND

A. Procedural History

While Jose and Monica Gracia played on a hammock strung between two trees at their great-grandfather's apartment, one tree collapsed on them. Petitioners sued the Brownsville Housing Authority ("BHA"), Mr. Trevino (its Executive Director) and Mr. Rubalcaba (its Maintenance Superintendent) in state court for state law torts. When the Gracias added a claim under 42 U.S.C. § 1983, Defendants removed to Federal Court.

At trial, the District Court granted only Mr. Trevino and Mr. Rubalcaba a directed verdict. In response to Question No. 1 (which submitted Plaintiffs' state tort claim), the jury failed to find Defendants knew of any danger the tree posed. PA K.[1] The Gracias did not challenge this finding on appeal.

Because the Court's charge conditioned the remaining questions on § 1983 liability on a "yes" answer to Question No. 1, the jury did not answer them. A take-nothing judgment resulted.

The Fifth Circuit affirmed. *Gracia v. Brownsville Housing Authority*, 105 F.3d 1053 (5th Cir. 1997, writ pndng.). It held that Question No. 1 correctly submitted BHA's duty under Texas tort law. 105 F.3d at 1056. It further held that the Gracias failed to prove the elements of a § 1983 claim against Defendants. *Id.* at 1058.

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[1] References to Petitioners' Appendix will be made as "PA ___."

B. Factual Background

The accident occurred during a family gathering at Esequiel Gracia's apartment. Jose and Maria Gracia and their children were social guests at his apartment. Jose Gracia was not a tenant at BHA, nor was he a low-income person desiring public housing.

Four children were in a hammock strung between an ebony tree and an avocado tree planted by Esequiel Gracia's mother in the 1950s. While they were swinging, the avocado tree suddenly fell over.

1. The Evidence Supported the Jury's Finding That BHA Had No Actual Knowledge The Tree Posed A Hazard

At trial, the critical question was whether the rotting inside the base of the tree was obvious. The annual inspection issue was a "red herring" because all witnesses agreed a BHA maintenance worker inspected and trimmed the tree shortly before the accident. Plaintiffs' problem throughout trial was that: (1) neither Esequiel Gracia nor any of the guests saw anything that made them think the tree was dangerous; (2) Mr. Stayton, Plaintiffs' own expert, admitted that one would have to have expert training, background, and tools to detect the rotted condition; and (3) prior inspections of the tree did not show that it posed a hazard.

a. Residents and Visitors Saw No Hazard

Esequiel Gracia had used the tree for decades to secure his hammock. Esequiel Gracia and the Gracias' all

testified the tree trunk appeared quite hard and sturdy; it had no visual signs that it would give way or collapse. The tree itself was over 40 feet tall. Its roots had sprouted several tall saplings that surrounded the tree.

b. Plaintiffs' Expert Testified It Takes Expertise to Recognize Hazard

Mr. Stayton, Plaintiffs' expert, testified that the tree collapsed because, after a freeze in 1983, it developed a rot inside of the trunk at the ground line. The rot produces a "punky" material inside the trunk's base. The decay will not be visible from the outside. Above the ground line, the trunk actually becomes much harder than living wood. The trunk's exterior will appear sound and hard.

Mr. Stayton agreed that only a person with specialized training or extensive experience in removing dead trees would know about the hazard from the interior rot. A lay person's understanding does not equate to the knowledge or experience of experts. He conceded that ordinary people would need special tools to detect the rot inside the trunk.

c. Prior Inspections Failed to Show Tree About to Fall

It was uncontroverted that BHA's employee trimmed the dead branches from the tree three months before the accident. Esequiel Gracia called Mr. Rubalcaba's office about three months before the accident to ask to have some dead branches trimmed.

A maintenance worker came to Gracia's apartment and removed several branches by tying a rope to them and pulling them off with his truck. Even after using the truck to pull off the branches, the worker believed the avocado tree still appeared sturdy and alive.

Mr. Rubalcaba did not believe the tree had died. When he saw it before the accident, it was surrounded by living saplings growing from its roots and appeared to have its own green leaves. Three other maintenance workers who had trimmed the tree during the three years before the accident thought the tree was still alive and sturdy.

2. There Was No Evidence That A Final Policymaker Deliberately Approved a Custom That Violated Any Federal Right

No statute or HUD regulation required Defendants maintain Esequiel Gracia's apartment or inspect it annually. BHA's Maintenance Plan (PA F) was a self-imposed policy adopted in response to a HUD suggestion. There was no evidence Defendants adopted or approved any custom of not inspecting apartments or trees.

In 1983, BHA adopted its Maintenance Plan in response to a *suggestion* by HUD's regional manager. The regional HUD office approved the Plan as part of fulfilling BHA's 1983 CIAP budget proposal to obtain modernization funds.[2] PA H. BHA's Plan did require annual

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[2] BHA had applied for funds to modernize under the Comprehensive Improvement Assistance Program, 42 U.S.C. § 1437l.

inspection of apartments, but did not require Mr. Trevino or Mr. Rubalcaba to personally inspect them.

Mr. Trevino felt BHA had complied with its maintenance plan after 1985. HUD commended him for the maintenance program. HUD made no complaints after 1985 that BHA failed to follow its maintenance plan.

Mr. Trevino delegated the actual inspection of the apartments to the project managers, as HUD recommended. Neither he nor Mr. Rubalcaba personally inspected any of the premises. There was no evidence of any widespread practice to not maintain apartments or not remove dead trees. They denied that there was a custom or practice of not doing maintenance or annual inspections.

The Gracia Petition, pp. 4-5, erroneously argues Mr. Trevino admitted proper inspections would have shown the tree was dead. He stated only inspections *could* have determined whether it was dead. If he had seen the tree before the accident, he would have had to consult an expert to know whether it was a hazard.

REASONS FOR DENYING THE WRIT

The Petitioners' claim that the courts below misconstrued BHA's duty under Texas tort law does not merit review by this Court. Their claim that HUD regulations gave social guests a right to safe premises enforceable under 42 U.S.C. § 1983 does not merit review by this

Court. The Fifth Circuit decision that the Gracias failed to make a *prima facie* case rests on settled law, and no conflict in the circuit is even alleged.[3]

A. Unnecessary to Review Substantially Correct Ruling on State Law Torts

The Petition, p. 7, erroneously claims the Fifth Circuit held the Texas Tort Claims Act (Chap. 101, Tx. Civ. Prac. & Rem. Code) gave BHA sovereign immunity against federal and state claims. This claim is a "red herring" for the Fifth Circuit never held sovereign immunity barred the Gracias' § 1983 or common law tort claims. This mischaracterization of the lower court's ruling is a thinly disguised attempt to attack its determination of BHA's tort duty under Texas law.

The Petition's statutory interpretation arguments, pp. 10-15, simply bear on whether question 1 in the court's charge correctly submitted the state law tort duty. If BHA was a "governmental unit," then the Texas Tort Claims Act, Chap. 101, Tx. Civ. Prac. & Rem. Code, applied. Section 101.022(a), Tx. Civ. Prac. & Rem. Code, defined BHA's duty for tort claims from defective premises to require proof that BHA had actual notice of the alleged

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[3] The Gracia Petition asserts no question challenging the directed verdict for Mr. Trevino and Mr. Rubalcaba in their individual capacities. Therefore, this Court should treat as abandoned any questions concerning their personal liability. *Coleman v. Thompson*, 501 U.S. 722, 744, 111 S.Ct. 2546, 2561, 115 L.Ed.2d 640 (1991); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 32, 81 S.Ct. 1357, 1377, 6 L.Ed.2d 625 (1961)

defect. *State Department of Highways v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992).

Ordinarily, this Court accepts the interpretation of state law made by the court of appeals. *Byrd v. Blue Ridge Rural Electrical Co-operative*, 356 U.S. 525, 529, 78 S.Ct. 893, 897, 2 L.Ed.2d 953 (1958). This Court is hesitant to overrule courts of appeals that are skilled in determining local law, unless their conclusion is clearly unreasonable. *United States v. Durham Lumber Co.*, 363 U.S. 522, 527, 80 S.Ct. 1282, 1285, 4 L.Ed.2d 1371 (1960). This Court defers to the court of appeals' interpretation of state law in order to render review of such determinations unnecessary; this rests on the sound belief that lower courts are better schooled and able to interpret the laws of their own states. *See Frisby v. Schultz*, 487 U.S. 474, 482, 108 S.Ct. 2495, 2501, 101 L.Ed.2d 420 (1988); *Cort v. Ash*, 422 U.S. 66, 73, 95 S.Ct. 2080, 2085, 45 L.Ed.2d 26 (1975).

The Fifth Circuit's interpretation of Texas law is correct. It properly concluded that BHA was a "governmental unit" as defined by § 101.001(2)(D), Tx. Civ. Prac. & Rem. Code. 105 F.3d at 1056. Providing public housing is a government function which properly put public housing authorities under the Texas Tort Claims Act. *San Antonio Housing Auth. v. Underwood*, 782 S.W.2d 25, 28 (Tex.App. – San Antonio 1989, no writ). Public authorities created by cities are generally treated as subject to the Texas Tort Claims Act. *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 82 (Tex. 1997); *Huckabay v. Irving Hosp. Auth.*, 879 S.W.2d 64, 66 (Tex.App. – Dallas 1993, writ dism'd by agr.).

B. HUD Regulations Do Not Create A Right Secured By the Laws of the United States Enforceable Under 42 U.S.C. § 1983

The Gracias have limited their § 1983 claim to violations of "rights" created by specific HUD regulations: 24 C.F.R. §§ 944.4(e) and 966.6(c).[4] They make no claim that BHA deprived them of a constitutional right or violated the terms of a federal statute. The HUD regulations do not create a right secured by the laws of the United States.

In pertinent part, § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities, secured by the Constitution *and laws* shall be liable to the party injured . . . " (Emphasis added)

In *Maine v. Thiboutot*, 448 U.S. 1, 6, 100 S.Ct. 2502, 2505, 65 L.Ed.2d 555 (1980), this Court recognized that § 1983 granted a cause of action to redress violations of federal statutes. However, if the federal statute does not create an enforceable "right" within the meaning of § 1983, no cause of action exists. *Suter v. Artist M.*, 503 U.S. 347, 355, 112 S.Ct. 1360, 1366, 118 L.Ed.2d 1 (1992).

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[4] The Petition also refers to duties created by 24 C.F.R. § 968.115(b). However, § 968.115 was not adopted by HUD until two years after the accident. 54 Fed. Reg. 52686 (December 21, 1989).

In *Suter*, this Court noted that § 1983 does not make actionable mere violations of federal law. 503 U.S. at 357, 112 S.Ct. at 1367. Rather, the court must look to the entire statute, its history and purpose, to see if Congress intended to create private, enforceable rights. *Id.* If Congress intended to impose as a condition upon federal grants that a federal right be created for recipients against the state, such a condition must be unambiguous. 503 U.S. at 356, 112 S.Ct. at 1366. The statute must clearly notify the state that the receipt of federal monies exposes the state to liability to recipients. 503 U.S. at 362, 112 S.Ct. at 1369.

The lower courts have consistently recognized *Suter* required proof that Congress, in exercising its spending power, unambiguously conferred an enforceable right upon statutory beneficiaries. *See, e.g., Stowell v. Ives*, 976 F.2d 65, 68 (1st Cir. 1992); *Resident Council of Allen Parkway Village v. United States Department of Housing & Urban Development*, 980 F.2d 1043, 1052 (5th Cir. 1993) *cert. den.*, ___ U.S. ___, 114 S.Ct. 75, 126 L.Ed.2d 43 (1993); *Maynard v. Williams*, 72 F.3d 848, 852 (11th Cir. 1996); *Ellison v. Cocke County*, 63 F.3d 467, 472 (6th Cir. 1995).

The Gracias' Petition, p. 17, suggests this Court has held that HUD regulations which specify lease terms may constitute a "law" enforceable through § 1983, citing *Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987); (O'Connor, J., dissenting). In *Wright*, low income tenants brought suit to enjoin the enforcement of HUD regulations that set the amount of utility charges that could be charged under 42 U.S.C. § 1437a. This Court and the lower courts agreed that 42 U.S.C. § 1437a intended to vest the tenants with

specific rights. 479 U.S. 424, 429, 107 S.Ct. at 770, 773. The question was whether Congress' statutory scheme foreclosed private enforcement for violations of § 1437a. *Id.* Therefore, the majority opinion relied upon the intent of a different statute rather than a regulation.

Justice O'Connor's dissent questioned whether regulations alone could create a "right" enforceable under § 1983. 479 U.S. at 437, 107 S.Ct. at 777. Her dissent pointed out the parties had not briefed the question of whether regulations can create such a right. *Id.* Her dissent further pointed out the serious policy questions that could arise if an administrative agency's changing views on how to best administer a program could become the focal point for the creation/extinguishment of federal "rights" under 42 U.S.C. § 1983. 479 U.S. at 438, 107 S.Ct. at 778.

For this reason, the lower courts have adopted the sensible view that a regulation cannot create a "right" enforceable under § 1983, unless that "right" exists in the statute that the regulation enforces. *See Mungiovi v. Chicago Housing Auth.*, 98 F.3d 982, 984 (7th Cir. 1996); *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987).[5] If the statutes create no enforceable right, then HUD regulations that implement the statutes do not create an enforceable right.

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[5] The Petition's citation, p. 15, to *Wei v. Robinson*, 246 F.2d 739, 743 (7th Cir. 1957) *cert. den.* 355 U.S. 879, 78 S.Ct. 144, 2 L.Ed.2d 109 (1957) is puzzling. There, in a deportation case, the court of appeals stated only that publication of rules in the Federal Register is *prima facie* evidence of the text. 26 F.2d at 743.

HUD's authority to promulgate 24 C.F.R. §§ 966.4 and 966.6 arises from 42 U.S.C. §§ 1437c(a) and 1437d(l). Section 1437c(a) simply authorizes HUD to enter into annual contribution contracts to fund public housing and prescribe regulations for the sound management of such project. Section 1437c(a) did not create a right actionable under § 1983. *Perry v. Housing Authority of the City of Charleston*, 664 F.2d 1210, 1213 (4th Cir. 1981); *Thompson v. Binghamton Housing Authority*, 546 F.Supp. 1158, 1178 (N.D.N.Y. 1982). Section 1437d(l) requires a housing authority to utilize leases which do not contain unreasonable terms and which require it to maintain the project in a decent, safe and sanitary condition. However, § 1437d(l) does not provide a federal cause of action for failure to maintain the premises. *Edwards v. District of Columbia*, 628 F.Supp. 333, 342 (D.D.C. 1985) *aff'd* 821 F.2d 651, 665 n. 2 (D.C.Cir. 1987); *Father Panik Village v. Pierce*, 685 F.Supp. 316, 322 (D.Conn. 1988). *See also, Hale v. Chicago Housing Authority*, 642 F.Supp. 1107, 1109 (N.D.Ill. 1986).

C. Social Guests at Public Housing Premises are not Within the Class of Persons Protected by Alleged "Rights"

The Gracias do not claim that the Fair Housing Act, 42 U.S.C. § 1437, *et seq.* gives social guests of tenants any particular rights to public housing. Rather, their Petition, p. 16, claims that § 966.4(d) extends the tenant's right to use and occupy the premises to invited guests.

Even if the Fair Housing Act could provide a private cause of action, the first question is whether plaintiff is a member of a class for whose benefit the statute was

passed. *Cort*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088. There is nothing in the Fair Housing Act to suggest Congress intended to provide safe housing for the benefit of the tenant's social guests. Standing to assert statutory violations under § 1983 has been limited to tenants directly affected by the statutes. *See, e.g., Thompson*, 546 F.Supp. at 1158 (claimants had no standing to complain of failures to comply with modernization program under 42 U.S.C. § 1437, when their apartments were not in the modernization program).

Even on its face, § 966.4(d)[6] does not give the Gracias any right to use or enjoy the property. The regulation only addresses what provisions the lease must contain; it does not provide rights to guests. Moreover, the regulation only addresses the *tenant's* use as including reasonable accommodation as guests and family members, i.e., temporary lodging. It does not give the guest the *right* to take up residency; rather, it provides the tenants with rights against being evicted if he entertains guests or accommodates relatives.

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[6] 24 C.F.R. § 966.4(d) provides:

"(d) *Tenant's right to use and occupy.* The lease shall provide that the tenant shall have the right to exclusive use and occupancy of the leased premises which shall include reasonable accommodation of the tenant's guests or visitors and, with the consent of the PHA, may include care of foster children and live-in care of a member of the tenant's family."

D. Petitioners Failed to Prove a Violation of Regulations

Section 966.4(e)[7] states only that the housing authority shall put certain clauses in its lease. It is uncontroverted that BHA's lease had these clauses. The congressional purpose was to require housing authorities to have certain clauses in their lease, not create a federal cause of action; the remedy for breaching any repair covenants was to sue in state court under state law. *Edwards*, 821 F.2d at 65; *Father Panik Village*, 685 F.Supp. at 322.

The Petition's reference to 24 C.F.R. § 966.6(c) is another "red herring." Section 966.6(c) forbids the housing authority from including lease clauses that waive the tenant's right to hold the landlord liable for negligence or intentional wrongdoing. BHA's lease contains no such clauses; it never argued any part of the lease waived any right the Gracias might have.

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[7] In pertinent part, § 966.4(e) provides:

"(e) The *PHA's obligations*: the lease shall set forth the PHA's [public housing authority] obligations under the lease which shall include the following:

"(1) To maintain the premises and the project in a decent, safe and sanitary condition;

"(2) To comply with the requirements of applicable building codes, housing codes, and HUD regulations materially affecting health and safety;

"(3) To make necessary repairs to the premises;

"(4) To keep project buildings, facilities, and common areas . . . in a clean and safe condition; . . . "

E. Petitioners Failed to Show that Their Injury Resulted From a Custom Deliberately Tolerated by Final Policymaker for Housing Authority

The majority opinion below did not reach an alternative ground for affirming the trial court, one adopted by Justice Dennis' concurring opinion. 105 F.3d at 1059. The Gracias failed to prove that BHA policymakers were deliberately indifferent to any federally protected right.

BHA is not vicariously liable under 42 U.S.C. § 1983 for the acts of its employees. *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412 (1989); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 63 L.Ed.2d 611 (1978). To hold BHA liable, the Gracias had to prove that a policymaker for the housing authority adopted a "custom" or "policy" with deliberate indifference to its known or obvious consequence. *Board of County Commissioners of Bryan County v. Brown*, ___ U.S. ___, 117 S.Ct. 1382, 1390 (1997); *Canton*, 489 U.S. at 388, 109 S.Ct. at 1204. A single isolated violation will not establish a custom; negligently administering a program is likewise insufficient. *Canton*, 489 U.S. at 390-91, 109 S.Ct. at 1206. Deliberate indifference is more than gross negligence and does not turn upon the culpability standard for the underlying wrong; rather, it exists only when the corporate decision reflects a deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. *Brown*, 117 S.Ct. at 1392; *Canton*, 489 U.S. at 388, 109 S.Ct. at 1204.

Finally, the custom or policy must be known to and approved by a final policymaker. *Brown*, 117 S.Ct. at 1389.

Jett v. Dallas ISD, 7 F.3d 1241 (5th Cir. 1993) *cert. den.* 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1993). The delegation of authority to make discretionary decision does not make the delegatee a final policymaker. *Louis v. Praprotnik*, 485 U.S. 112, 130, 108 S.Ct. 915, 926, 99 L.Ed.2d 107 (1988); *Jett*, 7 F.3d at 1246.

The Petition, p. 9, erroneously claims the Court's Charge, PA K, identified Mr. Trevino and Mr. Rubalcaba as policymakers. The Charge did not identify anyone as a policymaker. BHA's policymaking authority is vested in commissioners, not its executive director or maintenance superintendent.

The City of Brownsville formed BHA in 1938 pursuant to legislative authority given it under Article 1296(k), VATCS [repealed, now Chap. 392, Tex.Loc.Gov.Code]. PA E. BHA's powers are vested with its commissioners and only they can vote. Sections 392.036 and 392.051(b), Tex.Loc.Gov.Code.

Neither the BHA's By-Laws nor Mr. Trevino's job description give him final authority to make policy. Section 392.038, Tex.Loc.Gov.Code, provides the housing authority may employ an executive director but does not specify his duties; the authority shall determine the position's duties. Art. II, § 4, of BHA's By-Laws provides the executive director:

> " . . . shall have general supervision over the administration of the business and affairs of the authority, subject to the direction of the Authority. He shall be charged with the management of the housing projects of the Authority."

The executive director's job description (PA G) provides he shall manage and direct all functions of BHA and ensure compliance with all HUD guidelines. The job description for the maintenance superintendent (PA G) did not give Mr. Rubalcaba any policymaking authority.

Assuming *arguendo* that Mr. Trevino was a final policymaker, there is no evidence he had knowledge of a widespread custom of failing to remove dead trees or not maintaining apartments. The Gracias offered no evidence that Esequiel Gracia's housing project had fallen into a state of general disrepair. There is no evidence that maintenance workers were ignoring repairs, or allowing dead trees to become hazards. Other than failing to remove the avocado tree, the Gracias offered no evidence where maintenance was deficient at Mr. Gracia's apartment. Three months before the incident, a maintenance worker decided the tree was sturdy enough not to need removal. This is precisely the kind of isolated incident that does not amount to a "custom."

Finally, there was no evidence to show Mr. Trevino acted with deliberate indifference. The Gracias do not challenge the jury's finding that BHA had no actual knowledge the tree posed a danger. Mr. Trevino had no specialized training in tree disease; the Gracias' own expert proved that only an expert would suspect the tree was rotting. If the Gracias' own expert concedes it would take expertise and specialized tools to detect the existence and extent of the rot, the evidence falls far short of establishing deliberate disregard. *Compare, Brown*, 117 S.Ct. at 1392.

CONCLUSION

For the reasons given above and for the reasons set out in the Fifth Circuit's Opinion, the Petition should be denied.

Dated August 21, 1997.

Respectfully Submitted,

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